IN THE SUPREME COURT OF THE UNITED STATES

NO. 87-6026

HEATH A. WILKINS,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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OCTOBER TERM 1987

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Heath A. Wilkins, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Missouri, in the case styled "State of Missouri v. Heath A. Wilkins, No. 68393".

LIST OF PARTIES

The petitioner, Heath A. Wilkins, appears through Lew A. Kollias, and Nancy A. McKerrow, Office of State Public Defender, 209B East Green Meadows Road, Columbia, Missouri 65203-3698.

Respondent, State of Missouri, appears by the Honorable William Webster, Attorney General of Missouri, P. O. Box 899, Jefferson City, Missouri 65102. Janet Thompson and Nancy A. McKerrow, Assistant Public Defenders, 209B East Green Meadows Road, Columbia, Missouri 65102, appeared in the proceedings before the Missouri Supreme Court, No. 68393.

OPINION BELOW

The opinion of the Supreme Court of the State of Missouri, in the case styled "State of Missouri v. Heath A. Wilkins, No. 68393," the case for which certiorari is being sought, was filed on September 15, 1987, appears at 736 S.W.2d 409 (Mo. banc 1987).

and may be found in the Appendix at pages 1-13. Counsel for Petitioner timely filed a Motion for Rehearing, which was denied on October 13, 1987. Thereafter, on October 13, 1987, the Missouri Supreme Court set Petitioner's death penalty execution date at December 17, 1987 (App. 22).

JURISDICTION

On September 15, 1987, an opinion rendered by the Supreme Court of Missouri affirmed the Petitioner's judgment and conviction for Capital Murder and his sentence of death (App. 1-13). Counsel for Petitioner timely filed a Motion for Rehearing, which was denied on October 13, 1987 (App. 21). On October 13, 1987, the Missouri Supreme Court set petitioner's execution date for December 17, 1987 (App. 22). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) (1987).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

This case also involves the following provisions of the statutes of the State of Missouri, which are set forth in the Appendix: Mo. Rev. Stat. Sections 552.020, 552.030, and 565.020 (1986)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the infliction of the death penalty on a child who was sixteen at the time of the crime constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Constitution of the United States?

2. If a criminal defendant in a capital murder case is found competent to stand trial, does the due process clause of the Fifth Amendment require a separate determination or heightened test of competency before that criminal defendant may waive his constitutional rights to counsel and to a jury trial in order to seek the death penalty?

3. Whether the infliction of the death penalty on Petitioner Wilkins constitutes excessive and disproportionate punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States in light of the overwhelming mitigating circumstances in his case?

STATEMENT OF THE CASE

On May 9, 1986, in the Circuit Court of Clay County, Missouri, appellant entered a plea of guilty to the charge of first degree murder, Mo. Rev. Stat. Section 565.020.1 (Cum. Supp. 1984). On June 27, 1986, appellant was sentenced to death.

Appellant was sixteen-years old on July 27, 1985 when, in the late evening hours, he and Patrick ("Bo") Stevens entered Linda's Liquors in Avondale, Clay County, Missouri, and robbed it. In the course of the robbery appellant stabbed the clerk, Nancy Allen, who died from her wounds. Appellant was arrested fourteen days later and, after being certified to stand trial as an adult, was charged by information with first degree murder.

Appellant initially pleaded not guilty by reason of mental disease or defect and he was ordered to undergo a psychiatric examination pursuant to Mo. Rev. Stat. Sections 552.020 and 552.030 (1986). Appellant was evaluated a second time, at the request of the defense

A competency hearing was held on April 16, 1986 during which two witnesses, Drs. Mandracchia and Logan, testified. Steven Mandracchia is a clinical psychologist for the State of Missouri. He testified that based upon his evaluation of petitioner he did not believe that petitioner was suffering from any mental disease or defect as defined by Chapter 552 of the Revised Statutes of the State of Missouri. Mandracchia further opined that appellant was competent to proceed, and finally, that appellant was competent to make the decision to plead guilty and to seek the death penalty. When he interviewed petitioner in November, 1985, Mandracchia was unaware of petitioner's desire to plead guilty.

Dr. William S. Logan is a psychiatrist and director of law and psychiatry at the Menninger Foundation. Logan testified that he had not reached a definite conclusion as to petitioner's competence to proceed. According to Logan:

> he (petitioner) has a fairly good cognitive and rational understanding of what court procedures are about, but there are some emotional things involved that could interfere with his decision making process at certain critical points.

Logan testified about petitioner's history of mental illness which began, according to Logan, "at the age of 5 or 6, if not before", and the kind of treatment necessary if any improvement in petitioner's mental health was to be made.

The trial court found petitioner competent "to proceed" and immediately thereafter petitioner informed the court that he wished to discharge his attorney and proceed pro se for the express purpose of seeking the death penalty.

On April 23, 1986, the trial court accepted petitioner's waiver of counsel, but ordered counsel to remain available for consultation. Petitioner then informed the court that he wanted to plead guilty. The trial court explained petitioner's rights to him, described death by lethal gas, and urged petitioner to change his mind.

On May 9, 1986 petitioner's guilty plea was accepted. Before accepting the plea the trial court stated that it had found petitioner competent on April 16, 1986 and then asked petitioner if he felt he was competent. Petitioner responded that he was.

On June 27, 1986 a sentencing hearing was held. After presentation of evidence, during which petitioner successfully objected to testimony which may have indicated the existence of mitigating factors, petitioner requested and received the death penalty.

Proceeding pro se, petitioner took none of the prescribed steps to appeal his guilty plea and death penalty. The Missouri Supreme Court requested the State Public Defender to enter the case as amicus curiae and to brief and argue the case.

After argument, the Court ordered petitioner examined by the Department of Mental Health of Missouri to determine his competency to waive counsel on appeal. Based upon the report it received from Dr. S.D. Parwatiker, which stated in pertinent part that petitioner "suffers from an impairment of reasoning which prevents him from imparting information without judging his actions, he is not competent to waive his constitutional rights and represent himself in front of the court," the Missouri Supreme Court set aside the submission and appointed counsel to represent petitioner.

On appeal, petitioner's appointed counsel raised four issues (Appendix 42-54).

In an opinion filed on September 15, 1987, the Missouri Supreme Court, in a 4-3 decision, rejected each of petitioner's claims of error and affirmed the death sentence.

REASONS TO GRANT THE WRIT

I. THE IMPOSITION OF A DEATH SENTENCE FOR AN OFFENSE COMMITTED BY A CHILD BELOW THE AGE OF EIGHTEEN CONSTITUTES CRUEL

AND UNUSUAL PUNISHMENT.

This Court has never directly decided whether it is unconstitutional to apply the death penalty to a juvenile offender.[1] In Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the Court granted certiorari to resolve that issue, but decided the case on other grounds and the juvenile issue was expressly not decided. Nonetheless, Justice Powell, writing for the Eddings court, recognized that:

> Youth is more than a chronological fact. It is a time and condition in life when a person may be most susceptible to influence and to psychological damage. Our history is replete with law and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.

455 U.S. at 115-116. Since minors lack the ability, through experience, perspective, and judgment to recognize and avoid choices and decisions detrimental to them, it has long been recognized that "juvenile offenders constitutionally may be treated differently from adults." Belotti v. Baird, 443 U.S. 622, 635, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979), reh'g. denied, 444 U.S. 887 (1979).

Reflecting the distinct attitude held by society toward the juvenile offender, every state now has a comprehensive juvenile court system, see, Kent v. United States, 383 U.S. 541, 544 n. 19, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966), and Missouri is no exception. See: Mo. Rev. Stat. Chapters 210 and 211 (1986). Further, by enacting, in 1950, the Federal Youth Corrections Act, 18 U.S.C. Sections 5005-5026 (1982), the federal government recognized the need "to provide a better method of treating young offenders . . . in that vulnerable age bracket, to rehabilitate them and restore normal behavior patterns." Dorszynski v. United States, 418 U.S. 424, 432-33, 94 S.Ct. 3042, 41 L.Ed.2d 855 (1974). Reflecting this general attitude, the express purpose of

[1] That issue is presently before the Court in Thompson v. Oklahoma, No. 86-6169, cert. granted, 107 S.Ct. 1284-85 (1987)

the Missouri Juvenile Code is

> to facilitate the care, protection and discipline of children who come within the jurisdiction of the juvenile court. This chapter shall be liberally construed, therefore, to the end that each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control, preferably in his own home, as will conduce to the child's welfare and the best interests of the state and that when such child is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which should have been given him by them.

Mo. Rev. Stat. Section 211.011 (1986). Thus, the legislature has recognized that, in cases involving juvenile offenders, the emphasis must be placed on the welfare of the juvenile and not on traditional notions of punishment and retribution that are the hallmark of adult offender cases.

Contemporary legislation also reflects the societal perception that a juvenile offender presents a distinct case from an adult offender. Ten states which have capital punishment statutes expressly prohibit the application of those statutes to juveniles.[2] Six of these states[3] set the minimum age for the imposition of the death penalty at 18; three[4] use 17 as the minimum, and one[5] sets 16 as the cutoff point.

Eleven other states, including Missouri, recognize the distinction between juvenile and adult offenders by giving exclusive original jurisdiction to the juvenile court, and they establish a minimum age at which juvenile court jurisdiction may be waived and the cause transferred to adult criminal court. In

[2] Cal. Penal Code Section 190.5 (Supp. 1985); Conn. Gen. Stat. Ann. Section 53a-46a(f)(1) (Supp. 1982); Ga. Code Ann. Section 17-9-3 (1982); Ill. Ann. Stat. Ch. 38 Section 9-1(b) (Supp. 1985); Neb. Rev. Stat. Section 28-105.01 (1982); Nev. Rev. Stat. Section 176.025 (1979); N.H. Rev. Stat. Section 630:5(III)(b)(5) (Supp. 1981); Ohio Rev. Code Ann. Section 2929.02(E) (1984); Tenn. Code Ann. Section 37-1-134(1) (1984); Tex. Penal Code Ann. Section 8.07(d) (Supp. 1985).

[3] California, Connecticut, Illinois, Nebraska, Ohio and Tennessee

[4] Georgia, New Hampshire and Texas

[5] Nevada

Missouri, as in four other states,[6] that age has been set at 16. Mo. Rev. Stat. Section 211.071 (1986). Further, in Missouri, as in many other states, the age of the offender is specifically designated as a mitigating circumstance in the capital punishment statute. Mo. Rev. Stat. Section 565.032 (1986).

Societal concern for the imposition of the death penalty on juvenile offenders and the concomitant recognition that the process involves extraordinary considerations is reflected in the decreasing numbers, over the last fifty years, of instances in which capital sentences are imposed and executed against juvenile offenders; see Teeters-Zibulka, "Executions Under State Authority: 1864-1967", R.W. Bowers, Legal Homicide (1984).[7] Appendix 59-65, V. Streib, Death Penalty for Juveniles: Past, Present and Future (1985), and Appendix 66-71, V. Streib, Persons on Death Row as of December 1985 for Crimes Committed While Under Age Eighteen (1986). As the American Law Institute has stated, "civilized societies will not tolerate the spectacle of execution of children, and this opinion is confirmed by the American experience in punishing youthful offenders." ALI, Model Penal Code, Section 210.6 Comment, 133 (Official Draft & Revised Comments, 1980).

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[6] Ala. Code Section 12-15-34(a) (1977); Ky. Rev. Stat. Ann. Section 208F.070(2) (1980); N.J. Stat. Section 2A:4A-26 (Supp. 1984); and Utah Code Ann. Section 78-3a-25(1) (Supp. 1983).

[7] The date presented therein indicates the following:

Executions of Young People in the U.S. By Date, Race & Age at Execution: 1864-1967

	16B	16W	17B	17W	18B	18W	19B	19W	Totals
1864-1939	4	1	16	6	31	8	26	21	114
1940-49	6	1	11	2	17	0	15	6	58
1950-54	0	0	2	0	2	0	8	2	14
1955-59	0	0	2	0	3	2	1	1	9
1960-67	0	0	1	0	0	0	1	0	2
	10	3	32	8	53	10	51	30	197

The state of Missouri has indicated, time and again, its paternalistic attitude toward juveniles. For example, one who is unmarried and sixteen years old, as was petitioner when he committed the offense, cannot vote, Mo. Rev. Stat. Section 115.133 (1986), cannot sit on a jury, Mo. Rev. Stat. Section 494.010 (1986), cannot buy or possess alcoholic beverages, Mo. Rev. Stat. Section 311.325 (1986), cannot enter into a contract, Mo. Rev. Stat. Section 431.055 (1986), and cannot sue or be sued, Mo. Rev. Stat. Section 507.110 (1986). It is thus not only incongruous but completely inconsistent that one who is treated as a minor and is protected in all other realms should be treated as an adult for this purpose alone and be executed as an adult.

Petitioner finally asserts that the imposition of the death penalty in this case, where petitioner was only sixteen-years old when the murder occurred, violates the fundamental precepts of international law.

In Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), this Court stressed, as it had in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), in which the Court found the death penalty for the rape of an adult woman to be grossly disproportionate and excessive, that, to the greatest extent possible, all objective criteria is helpful and should be utilized in making the proportionality determination. 458 U.S. at 788. The Enmund court went on to note, "Accordingly, the court looked to the historical development of the punishment at issue, legislative judgment, international opinion, and the sentencing decisions juries have made before bringing its own judgment to bear on the matter." 458 U.S. at 788-789 (emphasis supplied). Further, "'[T]he climate of international opinion concerning the acceptability of a particular punishment' is an additional consideration which is 'not irrelevant.'" 458 U.S. at 796 n. 22, citing Coker, 433 U.S. at 596 n. 10.

Article I of the American Declaration for the Rights and Duties of Man, adopted at the Ninth International Conference of American States in 1948,[8] guarantees all people the right to life; Article VII provides that protection, care, and aid be specially afforded to children, and Article XXVI prohibits the imposition of cruel, infamous, or unusual punishment upon an offender. These guarantees can be read to prohibit the imposition of the death penalty upon a juvenile.

Over 80 nations have either completely abolished the death penalty or have forbidden its application to certain offenses and to certain offenders, including juveniles. Hartman, "Unusual Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty", 52 U. of Cinn L. Rev. 655, 666 n. 44 (1983). Recent data indicates that 41 nations which have retained the death penalty have statutory provisions exempting youth from its imposition, five of those countries being member states of the Organization of American States. Id. The available data indicates that "[T]he great majority of Member States [of the United Nations] report never condemning to death persons under 18 years of age." U.S. Economic & Social Counsel, Report of the Secretary General on Capital Punishment at 17. U.N. DOC. E/5242 (1973).

Notably, in the international community, at least three instruments regarding human rights prohibit the imposition of the death penalty on juvenile offenders. Article 4(5) of the American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. K/XVI 1.1, DOC 65 Rev. 1 Corr.1 (1970), provides that "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age ." Article 6(5) of the International Covenant on Civil and Political

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[8] The Declaration is legally binding on the United States as a member of the Organization of American States. Case 2141 (1981), International Commission on Human Rights

Rights, Annex to G.A. Res. 2200, 21 U.S. GAIR Res. Supp. (No. 16), at 53, U.S. DOC A/6316 (1966), states that "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age . . . ." Finally, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 68, 6 U.S.T. 3516, T.I.A.S. No. 3365 Section 75 U.N.I.S. 287, provides, in part, that "In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offense."

Furthermore, in the United States itself, the American Law Institute, in the Model Penal Code, has recommended a bar to the execution of offenders who committed the subject crime while under 18 years of age. ALI Model Penal Code Section 210.6(1)(d) (Proposed Official Draft, 1962); Section 210.6, Comment, 133 (Official Draft & Revised Comments 1980). Finally, in 1983, the American Bar Association passed a resolution opposing the "imposition of capital punishment upon any person for any offense committed while under the age of 18". ABA Report No. 117A, approved August 1983.

Petitioner asserts that, under the "evolving standards of decency that mark the progress of a maturing society" Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958), the execution of one who was still a juvenile, here, sixteen years of age, when the offense was committed, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. This Court should grant certiorari to the Missouri Supreme Court in order to review this issue, or hold this petition in abeyance pending resolution of this issue.

2 THE MISSOURI SUPREME COURT HAS DECIDED THAT THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION DO NOT REQUIRE A SEPARATE DETERMINATION OR HEIGHTENED TEST OF

COMPETENCY BEFORE A CRIMINAL DEFENDANT MAY WAIVE HIS CONSTITUTIONAL RIGHTS TO COUNSEL AND TO A JURY TRIAL SO LONG AS THAT DEFENDANT HAS BEEN FOUND COMPETENT TO STAND TRIAL THAT DECISION CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT, FEDERAL COURTS OF APPEAL, AND THIS COURT'S DECISION IN WESTBROOK V. ARIZONA

Petitioner submits that the Missouri Supreme Court's opinion, wherein it denies petitioner's assertion that "a heightened test of competency" was required in his case, conflicts with this Court's decision in Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966) (per curiam), and decisions of other courts, both state and federal, which have decided this issue.

In denying this point, the Missouri Supreme Court held that:

> Counsel urge that there should be a heightened test of competency in this case. Although an incompetent, as a juvenile, may be impaired by his limited cognitive and social capacities, [citation omitted] Judge McFarland could not have been more unbiased, reasonable and fair in his consideration of competency. Any finding of competency necessarily entails the ability to waive certain rights beginning with the very first strains of Miranda. Id. at 961 (juveniles may validly waive both self-incrimination and right to counsel privileges). Moreover, and analogous to the threshold question of competency to stand trial, Missouri law presumes competency, as all persons are presumed to be free of mental disease or defect which would exclude their responsibility for their conduct. Section 551.030.7, RSMo Supp. 1984. The point is denied.

Appendix at 6.

In Westbrook, this Court reversed a first degree murder conviction where the death penalty had been imposed because, although there had been a hearing on the issue of the defendant's competency to stand trial, there had been no hearing or inquiry into the issue of his "competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense." Id. 384 U.S. at 151. Lower courts have reached conflicting decisions on what the decision in Westbrook requires.

At least four courts have concluded that Westbrook indicates that the standard for competency to waive the right to counsel is higher than the standard for competency to stand trial. United States v. McDowell, 814 F.2d 245, 250 (6th Cir. (1987); Pickens v. State, 292 N.W.2d 601 (Wis. 1980); United States ex rel. Konigsberg v. Vincent, 526 F.2d 131, 133 (2d Cir. 1975), cert. denied, 426 U.S. 937 (1976); State v. Kolocotronis, 73 Wash. 2d 92, 101, 436 P.2d 774 (1968). However, two courts have rejected such an interpretation finding either that formulating a separate, higher competency standard would prove unworkable, People v. Reason, 37 N.Y.2d 351, 354, 334 N.E.2d 572, 372 N.Y.S.2d 614 (1975), or, that a defendant's competence to act as his own lawyer is irrelevant so long as he has the mental capacity to realize the probable risks and consequences of self-representation. Curry v. Superior Court, 75 Cal. App. 3d 221, 226-227, 141 Cal. Rptr. 884, 887 (1977). One other court expressly declined to decide the issue but recognized that a separate hearing, based on a higher standard, may be required. Goode v. Wainwright, 704 F.2d 593, 597 (11th Cir. 1983), rev'd. on other grounds, 464 U.S. 78 (1984).

Likewise, lower courts have split on the issue of whether Westbrook mandates a higher standard of competency in cases where the issue is the defendant's right to waive trial by jury and to plead guilty. In Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973), the Ninth Circuit, relying on Westbrook, held that a higher standard of competency is required to waive constitutional rights than is required to stand trial. Id. at 213. The Sieling court held that the standard used should "require a court to assess a defendant's competency with specific reference to the gravity of the decisions with which the defendant is faced." Id. at 215. One other circuit has expressly adopted the reasoning of the Sieling court. United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976) ("the level of awareness and comprehension necessary

for a valid waiver of constitutional rights differs from the level necessary to stand trial." Id. at 726 n. 30), as have two state courts. See, State v. Jones, 664 P.2d 1216, 1219 (Wash 1983) (en banc); State v. Cameron, 704 P.2d 1355, 1357 (Ariz App 1985);

Other circuits have rejected Sieling, at least in cases where the defendant is represented by counsel. See e.g., United States v. Harlan, 480 F.2d 515 (6th Cir.), cert. denied, 414 U.S. 1006 (1973); Malmauskas v. United States, 505 F.2d 649 (5th Cir. 1974); United States ex rel. McGough v. Hewitt, 528 F.2d 339, 342 n. 2 (3d Cir. 1975); Allard v. Helgemoe, 572 F.2d 1, 5 (1st Cir. 1978), cert. denied, 439 U.S. 858 (1978); United States ex rel. Heral v. Franzen, 667 F.2d 633 (7th Cir. 1981)

Petitioner would urge this Court to grant the petition in order to settle this question. Petitioner submits that the reasoning of the Ninth Circuit, that a higher standard of competency is required to waive constitutional rights than is necessary to stand trial, should be adopted.

Even if this Court rejects the Ninth Circuit's reasoning for most criminal defendants, petitioner contends that the separate determination and heightened standard of competency are required in those cases, such as this, where the State seeks to impose the ultimate punishment. In capital cases, the competency standard enunciated by this Court in Rees v. Peyton, 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966) is appropriate and should be applied. Rees involved a defendant convicted of murder and sentenced to death. Although the defendant had cooperated with counsel during trial and appeal, after those efforts were unsuccessful he instructed his attorney to abandon the attempt for certiorari review and to forego further legal proceedings. Petitioner, like the defendant in Rees, is asserting his "right" to demand his own execution by foregoing legal proceedings. In essence, petitioner's decision to forego further proceedings was

brought to fruition on April 29, 1986 when the trial court allowed him to waive counsel and proceed pro se. In Rees, it was established that, as a matter of due process, a prisoner cannot be permitted to refuse the assistance of counsel and terminate legal proceedings without an adequate hearing to determine his ability to rationally make such a choice. The standard enunciated in Rees is as follows:

> Whether the defendant has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or whether he is suffering from mental disease, disorder or defect which may substantially affect his capacity in the premises.

Id., 384 U.S. at 314.

This Court has repeatedly recognized that the death penalty is unique in its finality, and therefore, enhanced due process protections are required. See, e.g. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1, 117-118 (1982) (O'Connor, J. concurring); Beck v. Alabama, 447 U.S. 264, 272, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S.Ct. 2954 57 L.Ed.2d 973 (1978); see also, State v. Bibb, 702 S.W.2d 462 (Mo. banc 1985); see generally: Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 S.Cal.L.Rev. 1143 (1980).

An element of the procedural protections American jurisprudence provides those charged with crimes is the allocation of the risk of erroneous decisions. In cases involving the death penalty, the State imposes upon itself the "beyond a reasonable doubt standard" even at the punishment stage of the proceedings, Mo. Rev. Stat. Section 565.030 (1986), because when the State seeks to impose the ultimate punishment, it must be as certain as is humanly possible that no mistakes are made. Bullington v. Missouri, 451 U.S. 430, 441, 446, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981); Addington v. Texas, 441 U.S. 418, 423-24, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). Such heightened due process is lacking in petitioner's case.

The trial court made no finding on the issue of petitioner's competence to waive his constitutional right to counsel and to a trial by jury. Neither the finding of competency to stand trial nor the guilty plea proceedings held in petitioner's case adequately resolved the question of his competency to waive his constitutional right to counsel or his right to a jury trial. His competency to make such waivers was not the issue at the April 16, 1987 competency hearing,[9] and the trial court never made a finding on that issue. Further, the numerous colloquies preceding the acceptance of petitioner's waiver of counsel and guilty plea cannot suffice to resolve the issue since they consisted of no more than the usual inquiries concerning voluntariness, lack of coercion and understanding of the consequences, and did not extend into the area of petitioner's mental competency at all. Under Rees and Westbrook, it is simply not enough that petitioner was found competent to stand trial. The standard for finding a defendant competent to stand trial in Missouri is less rigorous than is required for a finding that a defendant possesses the mental/emotional ability to make a knowing and voluntary waiver of constitutional rights. Such a heightened standard is critically important here, where the State seeks to impose the ultimate punishment.

Petitioner asserts that the procedure used, and the evidence adduced, by the trial court to determine his competency in this case was inadequate to ensure against error. The finding of competency in this case was made without specific reference to the gravity of the decisions petitioner was making. When it became known to the trial court that more was at stake here than

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[9] At the competency hearing, Dr. Mandracchia offered his opinion that petitioner was competent to make the decision to plead guilty and seek the death penalty. However, when Mandracchia evaluated petitioner in November, 1985, he was unaware that petitioner would waive his right to counsel and plead guilty. Dr. Logan, who was aware of petitioner's desire to waive his right to counsel and plead guilty, did not reach a definite conclusion concerning petitioner's competency.

petitioner's "capacity to understand the proceedings against him or to assist in his own defense",[10] a separate inquiry was necessary, and without it, the risk of error is simply too great to be countenanced. The risk that an erroneous decision may have been made in this case becomes clear when the information available to the trial court is set out:

> - there were two mental evaluations performed, one based on a one and one half hour interview, the other on a five hour interview;
>
> - one doctor offered his opinion that petitioner was competent not only to stand trial, but also to seek the death penalty, even though he was unaware that that was petitioner's intent at the time of the interview;
>
> - the other doctor refused to state a definite opinion as to petitioner's competency;
>
> - petitioner has a long history of mental illness including suicidal and homicidal tendencies, drug abuse, and a family history of mental illness; and finally,
>
> - petitioner has consistently made determined efforts to guarantee himself the death penalty.

The trial court's action of permitting petitioner to waive his constitutional rights to counsel and his right to a jury trial without a separate determination of petitioner's competency to do so was a denial of petitioner's right to due process. The Missouri Supreme Court's opinion which ratifies that action is in conflict with this Court's decisions in Westbrook v. Arizona, supra and Rees v. Peyton, supra, and the decisions of other federal and state courts which have considered this issue.

The Missouri Supreme Court's disposition of this issue is particularly distressing in light of the findings of Dr. S.D. Parwatikar. Dr. Parwatikar evaluated petitioner pursuant to the Missouri Supreme Court's October 3, 1986 Order (Appendix at 24). According to Parwatikar's report of December 29, 1986 (Appendix 25-40), petitioner was evaluated to determine his competence to waive his right to counsel. Parwatikar concluded that petitioner

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[10] Mo. Rev. Stat. Section 552.020 (1986).

is "not competent to waive his constitutional rights and represent himself in front of the court". Petitioner submits that it is anomalous for the Missouri Supreme Court to find that petitioner is currently incompetent to represent himself on appeal while at the same time finding that on April 23, 1986 petitioner was competent to waive his right to counsel and that on May 9, 1986 petitioner was competent to waive his right to a jury trial. This Court should grant certiorari to the Missouri Supreme Court in order to settle this issue.

3. THE INFLICTION OF THE DEATH PENALTY ON PETITIONER WILKINS WOULD CONSTITUTE EXCESSIVE AND DISPROPORTIONATE PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN LIGHT OF THE OVERWHELMING MITIGATING CIRCUMSTANCES IN HIS CASE.

The Eighth Amendment's prohibition against cruel and unusual punishment has long been recognized to include as "a precept of justice that punishment for crime should be graduated and proportioned to the offense." Weems v. United States, 217 U.S. 349, 367 (1910). The proportionality of a particular punishment may be considered not only in the abstract, for example, where the Court considered the propriety of the death penalty for the rape of an adult female, Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), but also in the particular where the Court is asked to determine the propriety of death as a penalty to be applied to a specific defendant for a specific crime. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976), reh'g. denied, 429 U.S. 875 (1976). This Court has on several occasions entertained claims that a particular death sentence was excessive or disproportionate, see, e.g., Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 2991 n. 40, 49 L.Ed.2d 944 (1976); Bell v. Ohio, 438 U.S. 637, 98 S.Ct. 2977, 2981 n., 57 L.Ed.2d 1010 (1978); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 2967 n. 16, 57 L.Ed.2d 973 (1978), but has never been required to decide those claims.

Petitioner presented uncontroverted evidence of at least three factors which, considered together, overwhelmingly mitigate his crime.

First, there is evidence in the record that petitioner has a long-term history of mental illness, which may be genetically based, and which impaired his ability to appreciate the wrongfulness of his conduct and his capacity to conform his conduct to the requirements of law.

Second, the murder was committed while petitioner, who has a history of drug and alcohol abuse, was under the influence of illicit drugs, specifically LSD, a known hallucinogen, which he had ingested at least three times on July 27, 1985, the last being within four hours of the murder. Petitioner had also ingested quantities of alcohol in the period immediately preceding the murder. Petitioner's ability to appreciate the wrongfulness of his conduct and his capacity to conform his conduct to the requirements of law was thus substantially impaired.

Finally, petitioner was only sixteen-years old when he committed the offense.

Petitioner has a long-term history of mental illness, which, according to Dr. Logan manifested itself at least by age five. Sherry Wilkins, petitioner's mother, was the daughter of an alcoholic father and she apparently physically abused petitioner when he was a child. Petitioner's only sibling, Jerrod, suffered severe emotional and mental problems and was ultimately diagnosed as schizophrenic. During petitioner's own psychiatric and psychological evaluations and treatment it was suggested, on at least one occasion, that petitioner's emotional and mental problems have some genetic basis.

Petitioner has been involved in the juvenile justice system since the age of eight. In 1979, he began a series of placements and psychiatric evaluations that continued until 1985. Among the institutions that dealt with petitioner are Tri-County Mental Health Center, Western Missouri Mental Health Center, Butterfield Youth Services, and the Crittenden Center. Petitioner's history as set forth in his records from these institutions shows that he has demonstrated extreme psychoses, manifested by a long-term pattern of suicide attempts. These suicide attempts, petitioner asserts, have culminated in this last, state-aided, attempt to commit suicide.[11] Dr. Logan stated that, on several occasions, anti-psychotic medication was prescribed for petitioner which he would not take. Petitioner himself, in the course of the evaluations by the doctor, described his mental state and resulting conduct on the night in question as "automatic" and like a "machine", thus raising the inference that his conscious, reasoning mind had ceased to function at the time of the occurrence. Dr. Logan further indicated that petitioner was a very disturbed boy on the night in question. Petitioner asserts that, because of his mental illness, he lacked the capacity to conform his conduct to the requirements of law.

Also in evidence and uncontested is petitioner's substantial history of drug and alcohol abuse, as well as his use, on the night in question, of both alcohol and LSD, a known hallucinogenic drug. It is uncontested that petitioner first began to use illicit drugs at approximately age five and that his drug and alcohol use increased practically unabated, extending from the use of marijuana to stronger hallucinogenic drugs such as LSD, which was his preferred drug. Petitioner has consistently maintained that, on July 27, 1985, he had had at least three "hits" of acid. Further, during that evening, he had been drinking fairly heavily and had again used LSD; taking the last "hit" of LSD within four hours of the murder. Petitioner asserts that, given his history of drug abuse and, more particularly, his abuse of both alcohol and LSD on the night of July 27, 1985, his ability to conform his conduct to the requirements of law was substantially impaired.

Finally, petitioner notes that, on July 27, 1985, he was a boy of only sixteen years of age. As an adolescent, he was

> more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault, offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.

Eddings v. Oklahoma, 455 U.S. 104, 116 n. 11, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978). Furthermore, the ability of a boy of 16 years to think in moral terms and to engage in moral judgments has not yet fully developed, as it generally has in people of more advanced years. Rest, Davidson & Robbins, Age Trends in Judging Moral Issues, 49 Child Development 263 (1978); Kohlberg, Development of Moral Character and Moral Ideology, in Hoffman & Hoffman, Review of Child Development Research, 404-405 (1964). Petitioner thus asserts that the death penalty was inappropriately imposed and is disproportionate and excessive given petitioner's age and his concomitant lack of capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of

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[11] Psychologists have recognized, as a typical response of one who wishes to commit suicide, the "suicide-homicide" phenomenon. Under this phenomenon, the desire to commit suicide is effectuated by means of the commission of a homicide that carries with it the likelihood that the death penalty will be imposed. See G.R. Strafer, Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 J. of Crim. Law & Criminology 860 (1983).

law [12]

It should also be noted that the existence of these mitigating factors may not have been fully considered by the trial court in assessing death as the appropriate punishment in this case. At the sentencing hearing petitioner had no interest in presenting mitigating evidence and, in fact, objected to testimony which may have provided mitigating evidence. The trial court sustained each of petitioner's objections. This Court should grant certiorari to establish that the death penalty is disproportionate and excessive punishment considering petitioner's age, his cognitive-emotional ~~disorder~~, and his extensive drug use.

CONCLUSION

For the reasons set forth in the Petition, petitioner respectfully submits that the Court should issue a writ of certiorari to the Missouri Supreme Court in order to review the issues raised herein.

Respectfully submitted,

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NANCY A. MCKERROW
Of Counsel

[12] Three justices of the Missouri Supreme Court agreed that punishing petitioner with death would be disproportionate and excessive. See, Appendix at 1-13, State v. Wilkins, 738 S.W.2d 409, 418 (Donnelly, J. dissenting).

IN THE
SUPREME COURT OF THE UNITED STATES

NO. _____

HEATH A. WILKINS,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF MISSOURI

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TABLE OF CONTENTS

STATE of Missouri, Respondent,

v.

Heath A. WILKINS, Appellant.

No. 68393.

Supreme Court of Missouri,
En Banc.

Sept. 15, 1987.

Rehearing Denied Oct. 13, 1987.

Juvenile defendant was convicted in the Circuit Court of Clay County, Glennon E. McFarland, J., of first-degree murder, and sentenced to death, and he appealed. The Supreme Court, Billings, C.J., held that: (1) evidence supported determination that defendant was competent to stand trial; (2) Circuit Court considered mitigating factors in imposing death sentence; (3) death sentence was not result of prejudice, passion, or any other arbitrary factors; (4) death sentence was supported by evidence of statutory aggravating factors; and (5) death sentence was not disproportionate or excessive when compared to similar cases.

Affirmed.

Blackmar and Donnelly, JJ., filed dissenting opinions, in which Welliver, J., concurred.

Welliver, J., filed dissenting opinion.

1. Criminal Law ⇐1213.8(8)

Death penalty was not cruel and unusual punishment under the United States or the Missouri Constitutions. Const. Art. 1, § 21; U.S.C.A. Const.Amend. 8.

2. Criminal Law ⇐625

Overwhelming and uncontroverted evidence on record established that juvenile defendant had capacity to understand proceedings against him and to assist in his own defense and was, therefore, competent to stand trial; psychological record was extensive and consisted not only of expert testimony but also galaxy of tests, and records on which they relied, from numerous institutions with which defendant had dealt. V.A.M.S. § 552.020, subd. 3(1) (1984).

3. Mental Health ⇐432

Juvenile defendant, exposed to possible death penalty, was not entitled to heightened test of competency to stand trial. V.A.M.S. § 552.030, subd. 7; § 552.020, subd. 3(1) (1984).

4. Homicide ⇐354

Trial court properly considered mitigating factors in sentencing juvenile defendant to death for first-degree murder conviction: in addition to defendant's age and educational background, trial court considered whether murder was committed while defendant was under influence of extreme mental or emotional disturbance and whether capacity of defendant to appreciate criminality of his conduct or to conform his conduct to requirements of law was substantially impaired. V.A.M.S. §§ 565.030, subd. 4(2, 3), 565.032, subd. 3(2, 6).

5. Homicide ⇐354

Imposition of death penalty upon juvenile defendant for first-degree murder conviction was not influenced by passion or prejudice. V.A.M.S. § 565.035.

6. Homicide ⇐354

Imposition of death penalty upon juvenile defendant was supported by evidence of statutory aggravating factors enumerated by trier of fact; evidence supported trial court's finding that defendant committed murder in wantonly vile, horrible, and inhuman manner, and that defendant committed murder during robbery. V.A.M.S. §§ 565.032, subd. 2(7, 11), 565.035.

7. Homicide ⇐354

Imposition of death sentence upon juvenile defendant for first-degree murder conviction was not disproportionate to penalty imposed in similar cases considering both circumstances of crime and defendant; murder was substantially more heinous than past killings which had been found to justify sentence of death, evidence against defendant was strong, and defendant had cruel attitude toward human life. V.A.M.S. §§ 565.035, 565.035, subd. 3(3).

Janet M. Thompson, Nancy A. McKerrow, Columbia, for appellant.

William L. Webster, Atty. Gen., John M. Morris, Asst. Atty. Gen., Jefferson City, for respondent.

BILLINGS, Chief Justice.

Defendant Heath A. Wilkins pleaded guilty to first degree murder and was sentenced to death for the brutal and multiple stabbing killing of a 26-year-old mother of two small children during the course of a robbery of the victim's convenience store. Affirmed.

Defendant, proceeding pro se after dismissing and waiving appointed counsel, entered pleas of guilty to the murder charge, armed criminal action (sentenced to life imprisonment), and unlawful use of a weapon (sentenced to five years imprisonment), the last charge arising at the time of defendant's arrest approximately two weeks after the murder. Even though defendant dismissed and waived his right to an attorney, the trial judge directed the attorney to stand by throughout all of the proceedings and be available to counsel and advise the defendant upon the latter's request.

The transcript of some 300 pages clearly reveals that the experienced and capable trial judge, the Honorable Glennon E. McFarland, fully explained, time and time again, defendant's various legal rights. Judge McFarland made repeated efforts to dissuade defendant from dismissing counsel and proceeding without an attorney. And, the conscientious trial judge offered to permit defendant to reconsider and withdraw his guilty pleas. Throughout the several court hearings, the defendant told the trial judge that he had fully and knowingly considered the alternative punishment of life imprisonment without eligibility for parole and that of the two possible sentences he preferred the death sentence. Section 565.020, RSMo 1986.

Because of defendant's stated position and acting as his own attorney, defendant did not take any of the prescribed steps to appeal his guilty plea and death penalty. Nevertheless, this Court requested the State Public Defender to enter the case as amicus curiae and to brief and argue "any issue subject to review."

The case was argued before the Court after defendant, appearing in person, advised the Court that he did not want the assistance of an attorney in the proceedings in this Court. At the conclusion of the arguments, the defendant was permitted to make a statement to the Court in which he took issue with some remarks of the public defenders arguing the case. The Court ordered defendant examined by the Department of Mental Health of Missouri to determine defendant's competence to waive counsel on appeal and ordered the case held under submission pending the report.

The report and evaluation of the defendant by the Department of Mental Health was filed with the Court, and the Court set aside the submission and appointed counsel to represent defendant. New briefs were filed and argument heard anew.

The complete record, consisting of the legal file and transcript, are before the Court. In order that this Court can properly review the death penalty imposed in this case and also consider the points advanced by the appointed counsel, it is necessary to set forth in some detail the evidence which led to the imposition of the ultimate penalty.

Approximately two weeks before July 27, 1985, the date of Nancy Allen's murder, defendant's friend, Patrick Stevens, was telling the defendant that he needed some money. "I [Wilkins] said, 'I know where we can get some money.' ... I told him exactly how we were going to do it and where we were going to do it." Defendant then described to Stevens a plan to rob Linda's Liquors, which was later communicated to two other confederates, Ray Thompson and Marjorie Filipiak. Linda's Liquors and Deli was owned and operated by Nancy and David Allen. It is a small convenience store located in the town of Avondale.

The four freely discussed the plan to rob Linda's or an alternative location during the next two weeks. Defendant also stated to the others that he would kill whoever was behind the counter because he wanted no witnesses. During the period before the crime, defendant sharpened his "butterfly" knife (a narrow-bladed martial arts weapon) with a diamond file. Defendant's girl friend, one of the four privy to the plan, attempted to dissuade him from his murderous plot. She had obtained some money from her parents and offered to run off with defendant but he declined.

On the evening of July 27, 1985, the four individuals were together. Defendant and his cohorts decided that the robbery of Linda's Liquors and Deli was on for that night. They all went to North Kansas City Hospital where they arrived about 10:15 p.m.

Leaving the other two, who were to secure taxis for after the robbery, defendant and Stevens left the hospital. To avoid detection they went through the woods to the deli. They carried a bag for carrying stolen merchandise. They arrived at a creek near the deli about 10:30 p.m. They observed the deli for a time because there were customers present. When the last customer had gone, they approached the deli. They took a towel out of the bag and wiped their shoes so that they would not

leave mudprints. So that the counter person, Nancy Allen, would not be suspicious, they left the bag outside.

According to their prearranged plan, defendant ordered a sandwich while Stevens went to the rest room behind the counter. Noticing that Nancy Allen was not where Stevens could easily reach her, defendant asked her for additional lettuce. When she moved to comply with the defendant's request, Stevens rushed out of the rest room and grabbed her. Defendant went around the counter and thrust his knife into her back. Defendant said he was aiming at the kidneys, which he thought would be a fatal wound.

Nancy Allen fell face down onto the floor. However, she rolled into a spread-eagled position with her back on the floor. Stevens could not find everything that he wanted to take and could not operate the cash register. He asked defendant what to do. Nancy Allen replied, directing Stevens to what he sought but this caused defendant to stab his helpless victim three more times in her chest. Two of these pierced the heart. She continued to speak, begging for her life. Defendant silenced her with four stabs into the neck, one of which opened the carotid artery.

As Nancy Allen's pierced heart oozed its life's blood into the opened cavities of her lungs and onto the floor, defendant and Stevens gathered up cash and merchandise and left the store. Defendant wiped fingerprints off the door handle before leaving. They stuffed the stolen items in the bag outside and left. Nancy Allen lay dying on the floor.

The pair met their compatriots at the hospital. They paired up and left in separate taxis for the Greyhound Bus Depot. They paired up again in a different combination and went to their common summer hangout, Sherwood Lake. The cash register coin tray was thrown into the lake and they burned the stolen checks. A week later defendant wanted Stevens to lure "some guys" into the lake area so he, the defendant, could kill them. This action was aborted when a police officer came into the area and defendant threw the murder knife into the lake.

Street talk led the Metropolitan Major Case Squad to the defendant and his companions, and they were picked up by police on August 10th. Before taking a statement, Detective Ron Nichols advised defendant of his rights. Defendant's mother, Lt. Dave Rogers, and a juvenile officer were also present. An extremely incriminating statement was taken. The certification for 16-year-old Heath Wilkins' trial as an adult was obtained on August 15, 1985 as required by Section 211.071, RSMo Supp.1984.

The litany of Fifth Amendment rights was read again to defendant at his arraignment in circuit court on October 17, 1985. Appointed counsel Fred Duchardt of the Clay County Public Defender's Office represented Wilkins and entered a plea of "not guilty by reason of mental disease or defect excluding responsibility" or "not guilty" to all the charges against defendant. A mental examination was ordered and the results from the Western Missouri Mental Health Center were filed with the court on December 19, 1985. Defense counsel sought an additional examination, which was obtained privately at the Menninger Clinic in Topeka, Kansas. The results of that examination became available in April of 1986.

A competency hearing was set for April 16th to inquire into the competency of the defendant at the time of his act as well as his present competency to stand trial. Unknown to the court but after long discussions with attorney Duchardt, defendant reversed his position. Defendant wanted to release counsel and proceed pro se, plead guilty, waive jury trial, and actively seek a sentence of death as his penalty.[1] The trial

1. This is not as novel as it might sound. *See* Urofsky, *A Right to Die: Termination of Appeal for Condemned Prisoners*, 75 J. of Crim.L. & Criminology 553, 553 (1984) (examining cases where convicted murders voluntarily terminated appeals that would have delayed their executions). "For some on death row, however, the darkest fear is not execution, but the prospect of living out their natural years incarcerated in a six-by-nine cell, under constant surveillance,

court first became fully aware of this turn of events at the April 16th competency hearing. Dr. Steven A. Mandracchia examined the defendant on November 27, 1985 before knowing that defendant intended to seek the death penalty. However, Dr. Mandracchia's opinions about defendant's competency were unequivocal. He said "that there was no evidence of mental disease or defect as defined by chapter 552 of the revised statutes of the state of Missouri." Later, after being advised of the defendant's intention to seek the death penalty, his opinion did not change. "I don't feel that he has any psychological or intellectual or cognitive limitations on his capabilities."

Dr. William S. Logan, M.D., Director of Law and Psychiatry at the Menninger Foundation, examined the defendant in March 1986 after the defendant had made his fateful decision. Attorney Duchardt had fully advised Dr. Logan of Wilkins' intentions as did the examinee himself. Dr. Logan resisted giving the categoric competency opinion that Dr. Mandracchia had given. Nonetheless, he found that the defendant had average intelligence. Moreover, although he found that Wilkins suffered from some emotional disorders of long standing, Dr. Logan "didn't see [Wilkins] as meeting the criteria for a severe mental illness as defined under the statutes of Missouri." In fact, Dr. Logan characterized "the execution of the crime as very purposeful, very deliberate, very well planned ... [with the defendant making] numerous efforts to avoid detection, showing that he appreciated the wrongfulness of it...." After hearing this testimony and interrogating defendant, the court found defendant to be competent.

Despite the finding of defendant's competency, Judge McFarland did not immediately grant his motion to proceed pro se. The right to proceed without counsel upon a voluntary and intelligent election has been recognized by the Supreme Court of the United States. *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 2527, 45 L.Ed.2d 562 (1975). However, the *Faretta* court recognized the disadvantages to a defendant who proceeds *pro se*. *Id.* at 834-35, 95 S.Ct. at 2540-41. Here, the trial court found itself faced with a peculiar constitutional quandary—a defendant may not be convicted and imprisoned without being accorded the right to assistance of counsel but a defendant may help himself into a conviction by his voluntary albeit inadequate self-representation. *Id.* at 832-33, 95 S.Ct. at 2539-40.

Consequently, the circuit judge took steps to ensure that the gravity and importance of defendant's decision was brought home to him. Judge McFarland explained the advantages of counsel to defendant, highlighted defendant's own inadequacies of education, age, and experience, and set the pro se hearing off for another week to ensure that defendant gave additional thought to this matter.

When the hearing resumed on April 23, 1986, the judge strongly voiced his belief that defendant should be represented by an attorney. He explained each consequence of defendant's action: the waiver of trial by jury on each charge including both phases of the murder trial, the ranges of punishment, the necessity of written waivers, as well as a detailed and vivid description of the effects of execution by poison gas. Finally, he set a pleading hearing for May 9th and admonished the defendant to talk to those whom he trusted and who could advise him about his chosen course.

On May 9th, the circuit court reconvened to consider defendant's desire to change his pleas to guilty and to waive trial. Again, the court persisted in its efforts to convince the defendant that the course was unwise. Again, the court advised him of the enormity and finality of his waivers of legal rights. Defendant politely but firmly rejected the court's advice. Judge McFarland explained that this course would probably lead the court to impose a death penalty. But, he explained that defendant might still get the life sentence. Finally, the court took evidence to substantiate a factual basis for the change of plea. At length, the court concluded that defendant under-

with little or no hope of ever regaining their freedom." Id.

stood the consequences of his actions and that defendant voluntarily and knowingly was waiving his rights and entering guilty pleas, and the court accepted the pleas of guilty to all the charges including murder in the first degree.

At the sentencing hearing of June 27, 1986, the court entered the maximum sentences on the two lesser charges. Judge McFarland again reviewed the variety of rights available to the defendant for the asking. Defendant declined again. The court offered him a chance even at this late stage to withdraw his plea.

The Court: You understand that I think it would be in your best interests that you withdraw your plea?

Defendant: "I understand what you think, your Honor."

Evidence was taken in the sentencing stage. It amply supports the guilt of the defendant. Heath A. Wilkins stood up at his last opportunity to address the circuit court and told the court, "... I'm asking the court to consider the death penalty as a [sic] more humane in the extent of possible happenings and pain received by, you know, me.... One I fear, the other one I don't."

Judge McFarland entered his order.

> The court does feel that the defendant's decision [to ask for death] was made rationally and after due thought and deliberation.... The court finds beyond reasonable doubt that the following aggravating circumstances exist: number one, the murder in the first degree was committed while the defendant was engaged in the perpetration of the felony of robbery; and, number two, the murder in the first degree involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible or inhuman.

Section 565.032.2 subs. (11) and (7), RSMo Supp.1984 (respectively).

Counsel for defendant raise four major points and multiple sub-points in their brief. First, that the trial court erred in finding defendant competent to proceed because the evidence was inadequate and that the trial court failed to make specific findings on the defendant's competency to waive his constitutional rights.

Second, counsel argued that the circuit court failed to consider mitigation at the sentencing hearing as required by the decision of the Supreme Court of the United States and the Missouri sentencing statute. Counsel also contend in their second point that the trial court erred quantitatively in weighing the aggravating circumstances it had found against the mitigating circumstances it had found. The court did not find two other aggravating circumstances beyond a reasonable doubt that had been requested for consideration by the State: "The offender committed the offense of murder in the first degree for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another." Section 565.032.2(4). "The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness." Section 565.032.2(12).

Third, the death sentence should be set aside because it is comparatively disproportionate to the penalty imposed in similar cases.

Finally, counsel contends that the death penalty is cruel and unusual per the Eighth Amendment of the United States Constitution and Article I, Section 21 of the Missouri Constitution.

[1] This Court has repeatedly rejected constitutional challenges to Missouri's death penalty provisions. *State v. Driscoll*, 711 S.W.2d 512, 517 (Mo. banc 1986) (list of citations). Similarly, the Supreme Court of the United States has held that the death penalty is not per se cruel and unusual punishment prohibited by the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. 153, 188-95, 96 S.Ct. 2909, 2932-36, 49 L.Ed.2d 859 (1976) (plurality opinion). Recent decisions have not varied from that course. *See Project: Criminal Procedure*, 75 Geo.L.J. 1170 (1987). The point should be denied.

[2] Counsel contends that the lower court's finding of defendant's competency was not supported by sufficient evidence; further that the trial judge failed to make a specific finding of defendant's ability to waive constitutional rights. In testing sufficiency, the reviewing court does not weigh the evidence but accepts as true all evidence and reasonable inferences that tend to support the finding. *State v. Brown*, 660 S.W.2d 694, 698–99 (Mo. banc 1983). This Court has observed the defendant, his demeanor, and listened to him, and the trial judge had over a period of months observed the defendant for prolonged sessions of hearings.

The psychological record is not insufficient as characterized by counsel but extensive and consists not only of the expert testimony but also the galaxy of tests, and records on which they relied, from the numerous institutions with which defendant had dealt. The basic test is whether mental illness renders the criminal defendant incompetent to stand trial because he "lacks capacity to understand the proceedings against him or to assist in his own defense." Section 552.020.3(1), RSMo Supp.1984; *see Winick, Restructuring Competency to Stand Trial*, 32 U.C.L.A. L.Rev. 921, 923 (1985). The overwhelming and uncontroverted evidence on this record establishes that defendant has met and continues to meet this basic test.

[3] Counsel urge that there should be a heightened test of competency in this case. Although an incompetent, as a juvenile, may be impaired by his limited cognitive and social capacities, *cf. Winick, supra*, at 961 (discussing various situations in which a defendant may waive his incompetency status), Judge McFarland could not have been more unbiased, reasonable and fair in his consideration of competency. Any finding of competency necessarily entails the ability to waive certain rights beginning with the very first strains of *Miranda*. *Id.* at 961 (juveniles may validly waive both self-incrimination and right to counsel privileges). Moreover, and analogous to the threshold question of competency to stand trial, Missouri law presumes competency, as all persons are presumed to be free of mental disease or defect which would exclude their responsibility for their conduct. Section 552.030.7, RSMo Supp.1984. The point is denied.

[4] In the second point it is contended that the trier failed to consider mitigation as required by state statute, Section 565.030.4, RSMo Supp.1984, and by *Eddings v. Oklahoma*, 455 U.S. 104, 110–14, 102 S.Ct. 869, 874–77, 71 L.Ed.2d 1 (1982). This claim is not supported by the record. The trial judge clearly indicates that he considered mitigating factors in addition to defendant's age in the required trial report. Defendant was 16 years and seven months old when he murdered Nancy Allen. He was 17 years and four months old when he pleaded guilty. He had completed nine years of education and had an intelligence quotient of 105.[2]

The report of the trial judge shows that he considered whether the murder "was committed while the defendant was under the influence of extreme mental or emotional disturbance." Section 565.032.3(2), RSMo Supp.1984. Second, he considered whether "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Section 565.032.3(6).

Counsel suggest that the weighing of mitigating factors is a quantitative or tallying process. Clearly it is not. For example, the trier must assess the punishment in a capital murder case at life imprisonment "[i]f the trier finds the existence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found by the trier." Section 565.030.4(3), RSMo Supp.1984. Just one mitigating factor might permissibly outweigh several aggravating circumstances under this provision and require the imposition of only life imprisonment and not the death penalty. But the reverse is also true. The trier may find that a single aggravating circumstance beyond a reasonable doubt "warrant[s] imposing the death sentence." Section 565.030.4(2). The trier's judgment as to the appropriateness of the sentence must be guided but is still discretional. The weighing process is a qualitative one not a quantitative one. The trial court considered all the mitigating circumstances fairly presented by the evidence and did not find that they outweighed the aggravating circumstances found beyond a reasonable doubt. The point is denied.

Counsel in point three ask us to do no more than what this Court is mandated to do. Section 565.035, RSMo Supp. 1984. The court must review whether the imposition of the death penalty was influenced by passion or prejudice, was supported by evidence of the statutory aggravating factors enumerated by the trier of fact, or was disproportionate or excessive when compared to similar cases. *See State v. Battle*, 661 S.W.2d 487, 493–95 (Mo. banc 1983), *cert. denied*, 466 U.S. 993, 104 S.Ct. 2375, 80 L.Ed.2d 847 (1984).

[5, 6] The record bears no suggestion of prejudice, passion or any other arbitrary factor. The trial court's patience and fair-play were well-demonstrated throughout. Similarly, the evidence supports his finding that defendant Wilkins committed the murder of Nancy Allen in a wantonly vile, horrible and inhuman manner. With cool, deliberate premeditation he remorselessly executed the prone, helpless Nancy Allen, who had ample time to consider her demise, her husband, and her one-year-old and three-year-old girls. Defendant brutally silenced her pleas for mercy. The defendant freely admits that he committed this murder during a robbery, which supports the other aggravating circumstance found by the trier. The death penalty was not influenced by passion or prejudice and the evidence supports the trial court's finding of two aggravating circumstances beyond a reasonable doubt.

[7] Finally, we are required to consider whether this sentence of death is disproportionate to the penalty imposed in similar cases considering both the circumstances of the crime and the defendant. *State v. Foster*, 700 S.W.2d 440, 445 (Mo. banc 1985), *cert. denied*, — U.S. —, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986). The cases the Court has reviewed demonstrate the penalty of death imposed here is not excessive or disproportionate to similar cases.

In *State v. Foster*, 700 S.W.2d 440, 441 (Mo. banc 1985), defendant, with an accomplice, planned an armed robbery of the apartment of two acquaintances. The jury in *Foster* found four aggravating circumstances, including two which are essentially identical to those found in the instant case—a murder involving depravity and a murder for gain. Death was imposed. *Id.* at 445.

In *State v. Lashley*, 667 S.W.2d 712, 716 (Mo. banc), *cert. denied*, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984), defendant was 17 years and one month old at the commission of the murder. Defendant with the intention of robbing the victim had stabbed the victim who did not die at the instant of attack. Lashley had been committed to various institutions and was considered to be of average intelligence. The death penalty was imposed.

In *State v. Newlon*, 627 S.W.2d 606, 609–10 (Mo. banc), *cert. denied*, 459 U.S. 884, 103 S.Ct. 185, 74 L.Ed.2d 149 (1982), an armed defendant entered a store with his accomplice after waiting for customers to leave so that the lone attendant would be isolated. Defendant entered knowing that the attendant might be killed after an accomplice's remark before they entered the store. The trier found that the murder was wantonly vile. *Id.* 627 S.W.2d at 621. The death penalty was imposed.

See also State v. Johns, 679 S.W.2d 253 (Mo. banc 1984), *cert. denied*, 470 U.S.

2. *See Burger v. Kemp*, — U.S. —, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) and dissenting opinion of Powell, J., at 3143. Issue was alleged ineffective assistance of counsel. Defendant was 17-years-old at time of murder, had an I.Q. of 82, functioned at a 12-year-old level, and had possible brain damage from beatings when he was child.

Thompson v. State, 724 P.2d 780 (Okla.Crim.App.1986) (defendant 15-years-old at time of murders), *cert. granted*, — U.S. —, 107 S.Ct. 1284–85, 94 L.Ed.2d 143 (1987), to consider whether Eighth Amendment imposes an age limitation on the application of the death penalty.

1034, 105 S.Ct. 1413, 84 L.Ed.2d 796 (1985); *State v. Byrd*, 676 S.W.2d 494 (Mo. banc 1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985); and *State v. Malone*, 694 S.W.2d 723 (Mo. banc 1985), *cert. denied*, — U.S. —, 106 S.Ct. 2292, 90 L.Ed.2d 733 (1986).

Aside from the general principles of deterrence, defendant's execution-murder of Nancy Allen is exceptional in its brutality. Unlike any of the cited cases except *Newlon*, the evidence herein demonstrates an *express preexisting plan* on defendant's part to kill anyone and everyone he found at Linda's Liquors and Deli to eliminate potential witnesses. This was no spur of the moment decision on defendant's part, but planned. Although the victim in this case was immediately assaulted when the robbery began, she had a substantial time in which to anticipate her fate and to plead for her life. *Cf. State v. Newlon*, 627 S.W.2d at 622. The suffering of the victim is certainly a factor in comparing this with other cases. *State v. Smith*, 649 S.W.2d 417, 434–35 (Mo. banc), *cert. denied*, 464 U.S. 908, 104 S.Ct. 262, 78 L.Ed.2d 246 (1983). Even after inflicting a mortal wound upon Nancy Allen, defendant was not content to let her die. He inflicted further mutilation upon her by stabbing her repeatedly in the throat to stop her from talking. *Cf. State v. Johns*, 679 S.W.2d at 257; and *State v. Malone*, 694 S.W.2d at 724. As all of these facts demonstrate, the murder at bar is substantially more heinous than past killings which have been found to justify a sentence of death.

Another factor supporting defendant's sentence, newly recognized in Missouri's 1984 revision of the homicide statutes, is the strength of the evidence against him. Section 565.035.3(3). Heinous murders have been committed in the past in which the evidence of the crime was circumstantial and the precise role of the accused in the killing was unclear; in such cases, an inference exists that the jury may have rejected a sentence of death for that reason. *See, e.g., State v. Turner*, 623 S.W.2d 4, 6–7 (Mo. banc 1981), *cert. denied*, 456 U.S. 931, 102 S.Ct. 1982, 72 L.Ed.2d 448 (1982); and *State v. Mitchell*, 611 S.W.2d 223, 224–25 (Mo. banc 1981). Such is not the case here. Defendant has admitted and described in great detail his dominant role in the killing of Nancy Allen from his planning of the murder in advance to his stabbing the victim to death, and his account is corroborated by autopsy evidence and the crime scene. By definition, the evidence of defendant's guilt could not be any greater than it is in a plea of guilty.

The final and a most chilling factor to be considered is the nature of defendant himself and his attitude toward human life. In his words, Nancy Allen was a "trash can" whose most convenient disposition was to be killed so she would not be "a bother" to defendant in the future. As evidenced by his actions, this statement by defendant is not mere bravado because he had made a prior and unconditional decision to kill the witnesses to his planned robberies and he had no reason to kill Nancy Allen other than the possibility that she might later testify against him. This was only one of a series of robberies and murders that defendant had intended to commit had he not been apprehended, and he had made attempts to kill people, including his mother, both before and after the Nancy Allen murder. There can be no doubt that, given defendant's attitude, he will unhesitatingly kill anyone who "gets in his way" unless and until he is prevented from doing so by the forces of civilized society. The sentence of death imposed upon defendant is the only reliable means of achieving that aim.

The judgment is affirmed.

ROBERTSON, RENDLEN and HIGGINS, JJ., concur; BLACKMAR, J., dissents in separate opinion filed; DONNELLY, J., dissents in separate opinion filed; WELLIVER, J., dissents in separate opinion filed and concurs in dissenting opinions of BLACKMAR and DONNELLY, JJ.

BLACKMAR, Judge, dissenting.

For the reasons assigned by Judge Billings the points raised by appointed counsel are without substance. The trial judge is to be commended for his fair and balanced handling of a very difficult situation.

Judge Billings expounds the deliberateness and atrocity of the killing. Judge Donnelly, in his dissenting opinion, demonstrates the vagaries in jury sentencing, describing killings which are no less repulsive, but in which the jury did not assess the death penalty. He senses a tendency to assess life rather than death when the offender is very young. I cannot add to the meticulous scholarship of both of my brethren.

Section 565.035.2, RSMo 1986, effective 10–1–84, directs us to "consider the punishment . . ." Pursuant to this obligation, I would hold that a defendant who was a juvenile at the time of the offense should not be subject to the death penalty. In *State v. Battle*, 661 S.W.2d 487, 495 (Mo. banc 1983) and *State v. Lashley*, 667 S.W.2d 712, 717 (Mo. banc 1984), I argued unsuccessfully against death sentences for minors. I would draw a line at the juvenile level. Lines must be drawn somewhere; the offender below fourteen may not be punished as a criminal. *See* Section 211.071, RSMo 1986. The death sentence should be reserved for those capable of *mature* deliberation. *See* Ellison, "State Execution of Juveniles:" Defining "Youth" as a Mitigating Factor for Imposing a Sentence of Less than Death. 11 Law and Psychology Review 1 (Spring, 1987).

It is suggested that my position is contrary to state policy as defined by the legislature, inasmuch as the statutes contain no prohibition on the execution of persons who were juveniles at the time of commission of the offense. I believe that the duties imposed on us by Section 565.035.2 authorize us to adopt some objective standards for imposition of the death penalty. I also submit that our duties under that section are in addition to the duty of comparison imposed by 565.035.3, and that we should undertake a broader review of death sentences than we have in the past.

I concur with Judge Donnelly as to the remaining issues discussed in his dissenting opinion.

DONNELLY, Judge, dissenting.

Mandatory review under section 565.035, RSMo 1986.[1]

In this case, defendant entered pleas of guilty and expressed a desire to be put to death. The Court conducts its mandatory review, § 565.035, RSMo 1986, of a sentence of death, imposed following a hearing to determine punishment, § 565.032.2, RSMo Cum.Supp.1983. For reasons stated, we reduce sentence to life imprisonment without possibility of probation or parole, barring executive act.

The facts are undisputed, drawn from defendant's statements to a police investigator and to the trial court during the sentencing phase, from reports and testimony of psychiatrists who examined defendant, and from the report of a presentence investigator. On the night of the fatal stabbing of Nancy Allen, defendant Wilkins was aged sixteen years, six months, twenty days. For about a month previous, he had been living on the streets of Kansas City with three other juveniles, Pat "Bo" Stevens, Roy "Shades" Thompson, and Marjorie "Midget" Filipiak. At Wilkins' initial suggestion, the foursome plotted to rob area businesses. Defendant proposed, and the group acceded to, Linda's Liquor & Deli in Avondale as an initial target. Wilkins maintained he would kill anyone present to conceal the perpetrators' identities. To facilitate his claimed objective, Wilkins purchased a narrow-bladed, martial arts knife from Stevens with money defendant had stolen from a laundromat.

As preconceived one to two weeks before, an intricate plan unfolded July 27, 1985. At or near 10:15 p.m., the four juveniles met at North Kansas City Hospital. Defendant and Stevens walked through a

1. Defendant filed no after-trial motions or notice of appeal in this case. Counsel appointed to represent defendant in proceedings before this Court have briefed and argued numerous points of law. We decline to review these at this time, given our disposition of the case. We intend no suggestion as to the merit of counsel's claims which may be grounds for post-conviction relief under Rule 27.26; defendant may pursue such relief at his option.

wooded area to the nearby deli, leaving Filipiak and Thompson at the hospital to await their return. The two boys stalked the target from along a neighboring creek while customers transacted business in the store and left. It was nearing closing time. Around 11:00 or 11:30 p.m., toting a change of clothes apiece in defendant's handbag, the two youths executed the crime. The handbag was left outside the deli to avert suspicion; both boys wiped mud from their shoes to avoid leaving footprints inside. Nancy Allen, the store clerk, was alone, seated behind the counter, when the boys entered. Wilkins ordered a sandwich. Stevens asked to use the restroom. When Stevens exited, he grabbed the victim, holding her while Wilkins rushed forward, produced the knife, and stabbed her in an area of her back he thought to be her kidney. Allen fell to the floor. Lying on her back, the victim responded to a question Stevens put to her, and began pleading with defendant not to kill her. Wilkins told Allen to be quiet, then stabbed her repeatedly in the chest and throat areas. Expert medical testimony indicated Mrs. Allen probably was deceased before Wilkins imparted the last wound to her body.

Stevens pilfered cash, checks, liquor, cigarettes and rolling papers from the cash register and store displays. Roughly $450.00 in cash and checks were taken. Stevens then "freaked out," and defendant had to push him out the door. Wilkins wiped Stevens' fingerprints from the doorknob before the pair made their immediate flight.

Defendant and Stevens rendezvoused with Filipiak and Thompson at the hospital. To evade any pursuit, the foursome left the hospital in cabs Filipiak summoned from two local cab companies. The juveniles rode in pairs to a Kansas City bus depot. There, they talked a while, divided the stolen cash, and the principals changed clothes. Stevens and Thompson left, again in a cab. Wilkins and Filipiak lagged behind about an hour to play video games, then left by the same means. The four met back at the lake area they frequented in Penguin Park and "tripped out." They used the stolen checks to start a fire. Defendant used his share of the money to buy drugs.

About a week later, Wilkins encouraged Stevens to lure "some guys" into the lake area so defendant could kill them. This plan was aborted when a patrolling police officer happened into the area. Wilkins threw his knife into the lake to avoid discovery. The weapon never was found.

Defendant was arrested August 10, 1985. He acquiesced to giving a statement, in which he admitted to and described in detail the deli store murder.

As indicated above, this case comes to the Court in a peculiar posture. Wilkins was certified to be tried as an adult and was appointed counsel, Mr. Frederick Duchardt. In late January or early February 1986, Wilkins informed Duchardt that he wished to withdraw an earlier plea, not guilty and not guilty by reason of mental disease or defect, and substitute pleas of guilt to all charges.[3] Defendant also expressed a desire to seek the death penalty as his punishment. Counsel refused to aid Wilkins in this sordid goal.

Two psychiatrists and a clinical psychologist investigated defendant's competence to stand trial through interviews and testing. On considering the psychiatrists' testimony at an April 16, 1986, hearing, the trial court found Wilkins competent to proceed. Wilkins immediately moved, *pro se*, to represent himself before the court. One week later, the court accepted defendant's written waiver of counsel.[3] Mr. Duchardt was discharged from representation, but the court ordered him to remain available to answer any legal questions defendant might have.[4]

2. Wilkins was charged with first degree murder, § 565.020.2, RSMo 1986; armed criminal action, § 571.015, RSMo 1986; and unlawful use of a weapon, § 571.030.1, RSMo 1986.

3. The court constantly reminded defendant of the wisdom of professional representation throughout these proceedings.

4. The Court commends Mr. Duchardt's service to the court below, under what undoubtedly were frustrating circumstances.

Wilkins immediately announced his desire to enter guilty pleas to all charges. The court attempted to dissuade him, to the point of describing how lethal-gas executions were performed. Defendant was encouraged to "talk to other people about this decision you're having to make," and the cause was continued until May 9, 1986. Wilkins persisted. When the case was resumed, he offered written petitions to enter the desired pleas. After extensive questioning, during which the trial judge offered defendant every opportunity to change his mind, the pleas were accepted as to each count. Sentencing was scheduled for June 27.[5]

Wilkins was given maximum sentences for the lesser offenses: five years' imprisonment for unlawful use of a weapon, life imprisonment for armed criminal action. The court then considered evidence on the appropriate sentence for Nancy Allen's murder.[6] In a bizarre climax to the proceedings, both prosecutor and defendant urged the ultimate sanction. Defendant realized his goal—the court passed a sentence of death. Supporting the sentence imposed, it found as aggravating circumstances that: 1) Defendant was engaged in perpetrating a felony (robbery) when the murder was committed, § 565.032.2(11); 2) The murder was outrageously or wantonly vile, horrible or inhuman, since it reflected depravity of mind, § 565.032.2(7).

Neither the record nor counsel suggest the sentence imposed reflects the least hint of passion, prejudice or arbitrariness. § 565.035.3(1), RSMo 1986. Moreover, the record supports the court's conclusions under section 565.032.2(7) & (11), RSMo 1986. We turn, therefore, to the dispositive question, "whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant." § 565.035.3(3), RSMo 1986. *Under the facts of this case*, in light of Wilkins' age as of the offense, his prolific abuse of drugs and alcohol, *and* his long history of mental and emotional affliction, we hold the sentence excessive and disproportionate, and reduce that sentence to one of life imprisonment without possibility of probation or parole, barring executive clemency. § 565.035.5(2), RSMo 1986.

Relevant cases for a review of the appropriateness of the sentence are those in which the judge or jury first found the defendant guilty of capital murder and thereafter chose between death or life imprisonment without the possibility of parole for at least fifty years.

State v. Bolder, 635 S.W.2d 673, 685 (Mo. banc 1982), *cert. denied*, 459 U.S. 1137, 103 S.Ct. 770, 74 L.Ed.2d 983 (1984).

First, we consider defendant's age. In four capital cases involving youths of comparable age, a life sentence was imposed. *State v. Greathouse*, 627 S.W.2d 592 (Mo. 1982) (defendant age seventeen); *State v. Allen*, 710 S.W.2d 912 (Mo.App.1986) (defendant age sixteen); *State v. White*, 694 S.W.2d 802 (Mo.App.1985) (defendant age seventeen); *State v. Scott*, 651 S.W.2d 199 (Mo.App.1983) (defendant age sixteen). Only one Missouri youth has been sentenced to die who was seventeen years old or younger as of his crime. *State v. Lashley*, 667 S.W.2d 712 (Mo. banc), *cert. denied*, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984).

In *Greathouse*, *Allen*, *White*, and *Scott*, the jury was instructed on defendants' lack of prior criminal activity as a mitigating factor reference sentence. In this sense, the case *sub judice* is distinct.[7] But the jury was similarly instructed in *State v.*

5. Indicative of the leeway the trial judge afforded Wilkins, the court informed that in the interim it would consider any change of heart Wilkins entertained reference his plea to the murder charge. Defendant remained firm in his intention.

6. Defendant waived trial by jury for the penalty phase of his murder trial. See § 565.030.4, RSMo 1986.

7. Wilkins, from an early age, engaged in arsons, burglaries, and stealing. These activities were before the court for its consideration during sentencing, embodied in Wilkins' juvenile records. § 211.321.1, RSMo 1986.

Battle, 661 S.W.2d 487 (Mo. banc 1983), *cert. denied*, 466 U.S. 993, 104 S.Ct. 2375, 80 L.Ed.2d 847 (1984) (defendant aged eighteen years, four months; no significant history of criminal activity; death sentence affirmed), and *State v. Blair*, 638 S.W.2d 739 (Mo. banc 1982), *cert. denied*, 459 U.S. 1188, 103 S.Ct. 838, 74 L.Ed.2d 1030, *reh'g denied*, 459 U.S. 1229, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983) (defendant eighteen; same history and sentence). As to *this age group* of offenders, then, the absence, and thus presence, of a significant history of criminal acts may be an unreliable predicate for proportionality review. As to *this age group* of offenders, perhaps the most to be said is that age as a mitigating factor, § 565.030.3(7), RSMo 1986, *standing alone*, is insufficient to overturn a death sentence, on grounds the penalty is excessive or disproportionate, once the trier of fact has passed such sentence. *State v. Lashley*, 667 S.W.2d 712 (Mo. banc), *cert. denied*, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984); *State v. Battle*, 661 S.W.2d at 494–95.[8]

Next, we look to cases in which death was imposed on a young offender and make comparison based on the nature of the killing. In *State v. Battle*, 661 S.W.2d 487 (Mo. banc 1983), *cert. denied*, 463 U.S. 993, 104 S.Ct. 2375, 80 L.Ed.2d 847 (1984), defendant, eighteen, stabbed an eighty-year old woman with a twelve-inch butcher knife. The mortal wound was inflicted just below the victim's left eye. The elderly woman, "naked, beaten and ravished," suffered nearly three hours before she died. The jury, recommended the death penalty, after being instructed only on the "vile, horrible or inhuman" nature of the killing as an aggravating circumstance. *See* § 565.032.2(7), RSMo 1986. *Battle* is different from this case. Nancy Allen was not sexually abused before or after the murder, *compare State v. White*, 694 S.W.2d 802 (Mo.App.1985) (indications victim may have been sexually molested after death; defendant, seventeen, received life sentence), *with sub judice and Battle*; and, no evidence indicated Mrs. Allen suffered for any prolonged period after Wilkins attacked her. Indeed, the coroner indicated she may have been dead by the time defendant imparted the last wound. Certainly this killing, however senseless, was no more repulsive than those involved in *State v. Beck*, 687 S.W.2d 155 (Mo. banc 1985), *cert. denied*, — U.S. —, 106 S.Ct. 2245, 90 L.Ed.2d 692 (1986) (nineteen-year old shot and killed elderly couple; life sentence); *State v. Greathouse*, 627 S.W.2d 592 (Mo.1982) (seventeen-year old struck uncle with ax, then shot him eight times; life sentence); *State v. Baskerville*, 616 S.W.2d 839 (Mo.1982) (nineteen-year old; triple-murder, life sentence); *State v. Allen*, 710 S.W.2d 912 (Mo.App.1986) (sixteen-year old, given life imprisonment; insisted after robbing couple, aged 67 and 68, that they be killed "the way Muslims kill people—by tying 'their ankles [?] to their feet'", laying each on stomach, then stabbing each in back of neck); *State v. Hurt*, 668 S.W.2d 206 (Mo.App.1984) (nineteen-year old, penitentiary inmate, killed cellmate by stabbing him more than sixty times; life term imposed); *State v. Scott*, 651 S.W.2d 199 (Mo.App.1983) (sixteen-year old; life imprisonment; robbed elderly couple at gunpoint, then stabbed wife twenty-two times; husband, also stabbed multiple times, survived).

In *State v. Lashley*, 678 S.W.2d 712 (Mo. banc), *cert. denied*, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984), the victim was stabbed in an area of her head where a section of skull had been surgically removed, exposing a "soft spot." Defendant was "seventeen years and one month old" as of the killing. His motive was to rob his fifty-five-year old, handicapped cousin; he did so in a manner described as "classic lying in wait." *Id.* 678 S.W.2d at 716. Wilkins' crime fits this genre. *See* § 565.032.2(4), RSMo 1986. But more is involved here, making *Lashley* distinct.[9] In none of the above, *Lashley, Battle, Blair, Beck, Greathouse, Baskerville, Allen, Scott, Hurt*, or *White*, was the nature of the defendant such as to raise serious question, as here, whether the defendant should be held so completely responsible for his conduct that we should affirm his sentence.[10]

8. Counsel invite the Court to consider whether sentencing a minor to die constitutes a *per se* violation of the Eighth Amendment of the Federal Constitution. We decline. *Battle* and *Lashley* state the law in Missouri barring contrary adjudication in the United States Supreme Court. *See Thompson v. Oklahoma*, — U.S. —, 107 S.Ct. 1284, 94 L.Ed.2d 143 *cert. granted*, — U.S. —, 107 S.Ct. 1284–85, 94 L.Ed.2d 143 (1987).

At age ten, Wilkins was referred to Tri-County Mental Health Center. For the next four to five years, excepting a seven-month probationary period at home, defendant underwent evaluation, treatment and detention at various Missouri institutions. He was diagnosed as possessing a borderline personality, schizotypal personality, and perhaps developing schizophrenia.[11] He was withdrawn, isolated, depressed, impulsive, displaying intermittent episodes of paranoid functioning. On at least two occasions, he was prescribed anti-psychotic medication. Officials at Crittenton Center expressed concern that defendant was at risk for violent, destructive, or self-destructive acts.[12] Indeed, Wilkins had on a number of occasions attempted suicide by cutting his wrist, overdosing on medication or illegal drugs, and leaping from a bridge into the path of a passing car.

Dr. Logan, who examined defendant to determine his competence to proceed below, intimated that Wilkins' heavy drug use was tied to his cognitive functioning.[13] Dr. Parwatikar, who interviewed Wilkins at this Court's instance to determine his competency to waive appellate counsel, suggested defendant's youth, in turn, was a feature which distinguished his mental and emotional make-up from a mere antisocial condition.

Dr. Logan testified below that Wilkins "suffered from an ongoing emotional disturbance" of "profound" proportion; he reported that defendant's actions on July 27, 1985, could not be divorced from his psychopathology. Even though Wilkins' condition could not be termed a legally recognized mental disease or defect, Chapter 552, RSMo 1986, Logan submitted in his report that:

> This is not to say that defendant did not suffer from significant impairment in his mental functioning as a result of mental disease which at the time of the crime hindered his emotional realization of the nature, quality, and wrongfulness of his conduct, and hindered his cognitive control of his conduct ..."

On these facts, considering defendant's age, *and* his significant cognitive-emotional disorder, *and* connected, extensive drug abuse, we hold the sentence excessive and disproportionate. Consistent with this holding, we reduce Wilkins' sentence to life imprisonment without possibility of probation or parole barring executive act.[14]

9. We also note "the issue ... is not whether any similar case can be found in which the jury imposed a [death] sentence, but whether the death sentence is excessive or disproportionate in light of similar cases as a whole." *State v. Mallett*, 732 S.W.2d 527, 542 (Mo. banc 1987).

10. We do not ignore the carefully-planned and carefully-executed nature of this heinous offense. Nor do we take lightly defendant's apparent disregard for the lives of others. We find only that Wilkins' age, his mental and emotional instability, *and* extensive drug use coagulate, inseparably, to quicken the conclusion, in our view the only conclusion, that the ultimate price is an excessive one to be levied on this defendant.

11. Wilkins' brother was diagnosed a schizophrenic in 1982. His father was committed for a period of time in an Arkansas mental facility. On these bases, one examing psychiatrist suggested defendant's dysfunctioning may have a genetic component.

12. Examining psychiatrist William Logan indicated these actions were intimately bound with defendant's disorder.

13. Defendant had used marijuana since he was five. He had abused inhalants, stimulants and depressants since age six. In the three summers prior to 1981, he estimated he had inhaled gasoline fumes on about 500 occasions. Since at least age ten or eleven, Wilkins had used LSD, by admission his favorite drug. On July 27, 1985, defendant ingested a home-made strain of the drug three times, the last at around 7:30 p.m. We find this drug use significant only to the extent it was a product of Wilkins' disorder, and to the extent it lends greater force to our conclusion, considered *in tandem* with the other factors we find persuasive in reducing sentence.

14. Defendant's desire to obtain the death penalty is noteworthy only in that we find it impertinent to this or any review under section 565.035. This Court will not permit a defendant to employ the judicial process as a vehicle for state-aided suicide.

After argument and submission, this cause was assigned to me for opinion. That opinion, which is set forth above, was rejected by the majority of the Court.

I respectfully dissent.

WELLIVER, Judge, dissenting.

I respectfully dissent. The principal opinion treats this case as though it were here on appeal, which it is not, and in my opinion, glosses over our statutory duty to make examination as to proportionality of the sentence. § 565.035.3(3), RSMo 1986. I concur in the separate dissenting opinion of Blackmar, J. and the separate dissenting opinion of Donnelly, J.

The record before us is a documentary of defendant-"appellant's" exposure to and his failure to respond to almost every known social program of this society during the first almost seventeen years of his life. Regardless of the current belief of many that the death penalty is a deterrent to crime, utilization of the death penalty in cases such as this only serves to bury and cover up the failures of our existing social and penal programs. The death penalty was never intended to punish crimes committed by juveniles and is totally disproportionate to the punishment of similar crimes committed by those of similar age. See cases cited in separate opinions of Donnelly, J. and Blackmar, J. The punishment should be reduced to life imprisonment.

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI, Respondent,	)	
vs.	)	No. 68393
HEATH W. WILKINS, Appellant.	)	

MOTION FOR REHEARING

Comes now appellant, Heath W. Wilkins, by and through undersigned counsel, and pursuant to Rule 30.26, respectfully requests the court to grant his motion for rehearing and states as grounds therefore as follows.

1. Appellant pleaded guilty to first degree murder, Section 565.020.1, RSMo Cum. Supp. 1984, in the Circuit Court of Clay County, Missouri, and was sentenced to death.

2. Appellant, proceeding pro se, took none of the prescribed steps to appeal his guilty plea and death penalty. This Court however, requested the State Public Defender to enter the case as amicus curiae and to brief and argue the case.

3. After argument, this Court ordered appellant examined by the Department of Mental Health of Missouri to determine appellant's competence to waive counsel on appeal.

4. Based upon Dr. S.D. Parwatikar's conclusion that appellant "suffers from an impairment of reasoning which prevents him from imparting information without judging his actions, he is not competent to waive his constitutional rights and represent himself in front of the court," this Court set aside the submission and appointed counsel to represent appellant.

5. Appellant's conviction and sentence were affirmed on September 15, 1987.

6. Appellant asserts that the death penalty is cruel and unusual punishment under any circumstances. More specifically appellant asserts that in affirming his conviction and sentence, the Court overlooked material matters of fact and law.

7. The Court's opinion gives a recitation of the facts of the case, slip op. at 3-6, and then uses those facts to find that the sentence of death in this case is not disproportionate to the punishment of similar crimes, slip op. at 15-19. In so doing, the Court overlooks the fact that appellant himself provided all of the facts on which the Court depends and that at the time many of these statements were made, he was actively seeking the death penalty. The Court further overlooks appellant's long history of mental/emotional disturbance which in combination with his desire for death, may well have affected the accuracy of, and motivation for, making such statements.

8. In a footnote, slip op. at 7, n.1, the Court states that appellant's decision to "release counsel and proceed pro se, plead guilty, waive jury trial, and actively seek a sentence of death" is not as novel as it might sound, citing, Urofsky, A Right to Die: Termination of Appeal for Condemned Prisoners, 75 J. of Crim.L. and Criminology 553 (1984). In so stating, the Court overlooks the fact that at the time he made these decisions, the sixteen-year-old appellant had never been in prison or on death row and therefore his decision to seek death was not based on an actual, rational, comparison of two, equally

horrible options. In fact, since the appellant gave up his right to a trial by jury, it cannot be said with certainty that he did not choose death over a sentence much less severe than "living out [his] natural years incarcerated in a six-by-nine cell, under constant surveillance, with little or no hope of ever regaining [his] freedom." Id. In addition, as a civilized society we should be concerned by the fact that conditions on death row are so inhumane that death becomes the preferable option for some death row inmates.

9. The Court's opinion misinterprets appellant's argument concerning the need for a separate inquiry into his competence to waive his constitutional rights to the assistance of counsel and trial by jury. Appellant's argument as to this issue is in no way grounded on the fact that he is a juvenile, slip op. at 13. Nor is appellant challenging the fairness or reasonableness of the trial judge, id. Instead, appellant asserts that the procedure used, and the evidence adduced, by the trial court to determine appellant's competence in this case were inadequate. The information available to the trial court at the time he allowed appellant to proceed pro se and plead guilty should have alerted him to the fact that appellant's competence was still an issue and that further evidence and findings were appropriate and necessary.

10. In holding that no heightened test of competency was required in this case, slip op. at 12, the Court's opinion is in conflict with Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966) wherein the Supreme Court held that due

process required a separate hearing or inquiry into the defendant's competence to waive his constitutional right to the assistance of counsel even though the defendant had received a hearing on the issue of his competence to stand trial. If competence to stand trial is judged by the same standard as competence to waive constitutional rights, the Supreme Court's opinion in Westbrook makes no sense.

11. The court's opinion also overlooks Rees v. Peyton, 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966) wherein the United States Supreme Court held that a defendant facing the death penalty would not be allowed to withdraw his certiorari petition and forego further legal proceedings unless the Court was satisfied that he had,

> capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or whether he is suffering from mental disease, disorder or defect which may substantially affect his capacity in the premises.

Id. 384 U.S. at 314. Appellant abandoned further legal proceedings at a much earlier stage than did the defendant in Rees. Although he was required to appear before the circuit court judge[1] for his plea and sentencing, the record makes it abundantly clear that appellant was not interested in challenging, but was in fact actively seeking, the death sentence he received. The Supreme Court's decision in Rees mandates a heightened test of competency given the facts of appellant's

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[1] Appellant joins the Court in its admiration of Judge McFarland and wishes to make clear that no claim of bias or unreasonableness on the judge's part has ever been raised in this case.

case.

12. In denying appellant's second point the Court finds that, "[t]he trial judge clearly indicates that he considered mitigating factors in addition to defendant's age in the required trial report." Slip op. at 13. The Court overlooks the fact that nowhere, on the record, does the trial court indicate what mitigating factors he considered when sentencing appellant to death. That these findings were included in the trial court's report to this Court does little to assure that they were considered at the time sentence was imposed. In addition, a number of United States Supreme Court cases hold that the sentencer must consider, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. 90 L.Ed.2d 1 (1986). Given the unique posture of this case, the trial court had an obligation to consider all of the evidence available to it, and not to allow the appellant, by objection, to keep certain, potentially mitigating evidence, away from his consideration.

13. In finding that the evidence supported the finding that the murder of Nancy Allen was wantonly vile, horrible and inhuman, slip op. at 15, the Court overlooks a fact that it had found earlier, that is appellant's statement that he had aimed at her kidneys, thinking it would be a fatal blow, slip op. at 4.

The majority opinion also overlooks the fact that "no evidence indicated Mrs. Allen suffered for any prolonged period after [appellant] attacked her. Indeed, the coroner indicated she may have been dead by the time [appellant] imparted the last wound." Slip op., dissenting opinion, Donnelly, J. at 7.

14. In its mandatory proportionality review the Court states that the final, and most chilling factor to be considered is the nature of appellant himself, slip op. at 18-19. The Court specifically finds that the appellant had little regard for the value of human life. In so finding, the Court overlooks the evidence of appellant's repeated expressions of deep remorse for what he has done, specifically his recognition of the harm he has caused Nancy Allen and her family.

In addition, the only evidence in the record which supports the Court's conclusion that appellant had made a prior and unconditional decision to kill the witnesses to his allegedly planned series of robberies is the appellant's own, self-serving statements (see para. 7, infra). Finally, there is no evidence that appellant actually attempted to kill people either before or after the murder of Nancy Allen.[2]

15. In finding that the sentence of death in this case was not disproportionate to the punishment for similar crimes, slip

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[2] In his report, Dr. Logan wrote "He [appellant] recalled a plot to poison the mother so she would get sick and break up with the boyfriend. The plot concerned putting poison in Tylenol capsules." Dr. Logan's report at 3.

op. at 15-19, the Court's opinion overlooks appellant's age[3] at the time of the offense, his prolific abuse of drugs and alcohol, and his long history of mental and emotional affliction.

WHEREFORE, for the reasons stated herein, appellant respectfully requests this Court to grant his motion for rehearing.

Respectfully submitted,

Nancy A McKerrow

Nancy A. McKerrow, MOBar# 32212
Attorney for Appellant
209B East Green Meadows Rd.
Columbia, MO 65203-3698
(314) 442-1101

CERTIFICATE OF SERVICE:

I hereby certify that a true and correct copy of the foregoing motion was mailed postage prepaid this 28th day of September, 1987, and sent by way of first class mail to the Office of Attorney General, P.O. Box 899, Jefferson City, MO 65102.

Nancy A McKerrow
Nancy A. McKerrow

[3] Whether sentencing a minor to death constitutes a per se violation of the Eighth Amendment is a question currently under consideration by the United States Supreme Court. Eddings v. Oklahoma, No. 86-6169, cert. granted, 107 S.Ct. 1284-85 (1987).

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

THOMAS F. SIMON
CLERK

TELEPHONE
(314) 751-4144

October 13, 1987

Ms. Janet M. Thompson
Ms. Nancy A. McKerrow
Office of State Public Defender
209B East Green Meadows Road
Columbia, Missouri 65203

Re: State of Missouri vs. Heath A. Wilkins, No. 68393

Dear Ms. Thompson and Ms. McKerrow:

This is to advise that the Court has this day entered the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled. Execution set for December 17, 1987."

Very truly yours,

Thomas F. Simon
Clerk

cc: Attorney General

No. 68393

Circuit Court No. CR185-491FX

In the Supreme Court of Missouri

September Term, 19 87

State of Missouri, Respondent,

vs. Appeal from the Circuit Court of Clay County

Heath A. Wilkins, Appellant.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Clay County *rendered, be in all things affirmed, and stand in full force and effect, and that the said respondent recover against the said appellant its costs and charges herein expended, and have execution therefor. It is further considered and adjudged by the Court that the sentence pronounced against the said* HEATH A. WILKINS *appellant herein, by the said* Circuit Court of Clay County *be in all things executed on* Thursday *the* 17th *day of* December, 19 87.

(Opinion filed.)

STATE OF MISSOURI—Set.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September *Session thereof, 19* 87, *and on the* 15th *day of* September *19* 87, *in the above entitled cause.*

Given under my hand and seal of said Court, at the City of Jefferson, this 15th *day of* September, 1987.

Clerk

D C

Supreme Court of Missouri

en banc

August 22, 1986

STATE OF MISSOURI, Respondent,

vs. No. 68393

HEATH A. WILKINS, Appellant.

O R D E R

The record on appeal and the report of the trial judge having been filed in this cause pursuant to section 565.035, RSMo Supp. 1984, the matter is docketed for review on October 3, 1986. Appellant's brief is due on or before September 10, 1986. Respondent's brief is due on or before September 25, 1986. Appellant's reply brief, if any, is due on or before October 1, 1986. Oral argument is set for October 3, 1986.

The State Public Defender is requested to appoint counsel to act as amicus curiae with respect to any issue subject to review. Amicus curiae's briefs shall be filed on or before the date appellant's briefs are due. Amicus curiae will be permitted time to argue to the extent time allocated to the appellant is not used.

Day - to - Day

Andrew Jackson Higgins, Chief Justice

STATE OF MISSOURI—SCT

I, THOMAS F. SIMON, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the order of said court, entered on the [illegible] *day of* [illegible] *19* [illegible], *as fully as the same appears of record in my office.*

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court, done at office in the City of Jefferson, State aforesaid, this [illegible] *day of* [illegible], *19* [illegible].

Clerk

D C

Supreme Court of Missouri

en banc

October 3, 1986

STATE OF MISSOURI,
Respondent,

vs. No. 68393

HEATH A. WILKINS,
Appellant.

REQUEST FOR MEDICAL EXAMINATION

This is an appeal from a conviction of first degree murder and sentence of death entered on a plea of guilty by appellant.

On October 3, 1986, this appeal was submitted on the record of proceedings in the trial court and the briefs and arguments of amicus curiae and of the office of the Attorney General.

Appellant appeared without counsel and in response to questions from the Court announced a waiver of his right to counsel as he did in the trial court. The question of the waiver was ordered taken with the case subject to medical examination to determine appellant's competence to waive his right of counsel on appeal.

The Court requests that the Department of Mental Health of Missouri designate S. D. Parwatikar, M. D., a psychiatrist, to examine appellant and make a report to this Court on the question of appellant's competence to waive his right to counsel. The case will be held under submission pending receipt of the report of Dr. Parwatikar.

Day - to - Day

Andrew Jackson Higgins, Chief Justice

EXHIBIT A

JOHN ASHCROFT
GOVERNOR

KEITH SCHAFER, Ed.D.
DIRECTOR
DEPARTMENT OF MENTAL HEALTH

ROBERT S. JONES, M.D.
DIRECTOR
DIVISION OF COMPREHENSIVE
PSYCHIATRIC SERVICES

STATE OF MISSOURI
DEPARTMENT OF MENTAL HEALTH
DIVISION OF COMPREHENSIVE PSYCHIATRIC SERVICES
MALCOLM BLISS MENTAL HEALTH CENTER
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(314) 241-7600

ROBERT O. BUETHER, M.S.
SUPERINTENDENT

LARRY C. McLEES, M.B.A.
ASSISTANT SUPERINTENDENT
ADMINISTRATION

SUN TEE CO, JR., M.D.
ASSISTANT SUPERINTENDENT
MEDICAL

DEC 31 RECD

December 29, 1986

The Honorable Andrew Higgins
State of Missouri Supreme Court
P.O. Box 150
Jefferson City, Missouri 65102

RE: Heath A. Wilkins
MB#: 064517/-
Cause No. 68393

Your Honor:

I have completed the evaluation of Mr. Heath A. Wilkins, a 17 year old, single, Caucasian male who is currently confined at Missouri State Penitentiary in Jefferson City, Missouri, having been convicted of First Degree Murder, Armed Criminal Action, and Unlawful Use of a Weapon, Circuit Court Case Nos. CR185-490FX, CR185-491FX, and CR185-492FX in Clay County and sentenced to death on June 27, 1986.

The current evaluation was ordered by the Supreme Court of the state of Missouri to determine the competency to waive his rights to counsel.

During this evaluation, I interviewed Mr. Wilkins for three and a half hours at Missouri State Penitentiary and reviewed the following materials:

1) mental examination performed at Western Missouri Mental Health Center, dated December 16, 1985 by Dr. Steven Mandracchia.

2) psychological test report done at the Menninger Clinic in Topeka, Kansas by Dr. Melvin Berg, dated April 8, 1986.

3) a diagnostic interview report of Dr. William Logan, dated April 11, 1986.

EXHIBIT B

4) an investigative report by the Board of Probation and Parole, state of Missouri, submitted by Mr. Steven Haynes, dated June 6, 1986.

5) a diagnostic report of the Classification Unit of the Department of Corrections written by Mr. Floyd George, CCW, dated July 8, 1986

6) transcript of the proceedings of the Supreme Court with appearances by Mr. Wilkins; Mr. John Morris, Assistant Attorney General; and Ms. Nancy McKerrow; and Ms. Janet Thompson, Assistant Public Defender (amicus curiae).

SUMMARY OF BACKGROUND MATERIAL:

Offense:

Mr. Wilkins, on 7/28/85, admittedly stabbed a female cashier at Linda's Liquor Store in North Bell, Kansas City. Mr. Wilkins who was a juvenile at that time made the statement in front of his mother and the Juvenile Officer, Ms. Joan Rumley, stating that he had taken a cab to North Kansas City Hospital where two of the codefendants stayed and Mr. Wilkins along with another codefendant went to Linda's Liquor to commit the crime. They watched people leave, then went inside to order a sandwich, at which time the codefendant asked to go to the bathroom. Mr. Wilkins continued indicating that he then asked for extra lettuce. The codefendant came out of the bathroom and grabbed the victim, at which time Mr. Wilkins admitted stabbing her where he thought her kidney was. He then continued stabbing her two or three times in the chest area and in the throat two or three times. Upon acquiring whether he knew they were going to kill the woman before they went to the liquor store, Mr. Wilkins reportedly answered affirmatively, indicating, "I told them there would be no witnesses."

Mr. Wilkins was subjected to competency examinations on 11/27/86 by Dr. Mandracchia; on 3/20/86 by Dr. Logan; and on 4/9/86 by Dr. Melvin Berg. Subsequently on April 16, 1986, a competency hearing was held and he was found competent to stand trial. A week later Mr. Wilkins was allowed to waive his right to counsel. On May 9, 1986 Mr. Wilkins withdrew earlier pleas and entered a plea of guilty to the charges of first degree murder, armed criminal action, and unlawful use of a weapon. During this time, Mr. Wilkins as well as the prosecuting attorneys recommended the death penalty. The court accepted the guilty plea. On June 22, 1986 following a sentencing hearing Mr. Wilkins was sentenced to death.

A amicus curiae brief was filed by Ms. McKerrow and Ms. Thompson which was heard on October 3, 1986, at which time having listened

to the arguments and Mr. Wilkins' testimony, this examination was ordered.

Summary of Mental Examination at Western Missouri Mental Health Center:

Except for the report that Mr. Wilkins had ingested LSD approximately four hours before the alleged offense and having admitted to moderately heavy recreational use of both alcohol and a variety of illicit drugs (primarily hallucinogens), Dr. Mandracchia did not find any significant information and concluded that he does not suffer from any mental disease or defect, pursuant to the provisions of Chapter 552, Revised Statutes of Missouri. He also opined that Mr. Wilkins was competent to assist his legal counsel and cooperate with the court in his own best interest.

Summary of Dr. Logan's Report:

After exhaustive review of his past history obtained from Mr. Wilkins' evaluation at Tri-County Mental Health Center, Western Missouri Mental Health Center during August and September of 1979, records from Butterfield Youth Services between the periods of 2/1/80 until 5/20/83, reports of staff members at Crittenton Center covering the period of 5/20/83 through 11/17/83, and a personal interview of five hours, Dr. Logan reported that Mr. Wilkins had an accurate understanding of the charges pending against him, potential penalties if convicted, possible pleas, the role of various officers and procedures of the court, and possession of sufficient memory and the ability to relate details of his case to his attorney, however, he stopped short of giving an opinion as to whether he was competent to proceed or not. Dr. Logan indicated in his report that although Mr. Wilkin's cognitive capacity was intact, his actions were governed more by his emotions. He emphasized that his wish to die and determination to plead guilty to speedily effect this and had resulted in his (Mr. Wilkins) feeling that his attorney was not working in his best interest. Thus, Dr. Logan stated, "In conclusion, while the patient has an adequate factual understanding of his situation and the ability to cooperate with his attorney, emotional issues may prevent him from acting in his own best interests. The weighing of these two factors, the cognitive versus emotional, is the essence of the decision before the court." Dr. Logan further opined that Mr. Wilkins suffered from a severe personality disorder characterized by enduring maladaptive patterns of perceiving, conceiving, and relating to his environment. He concluded that his diagnoses were "Conduct Disorder Undersocialized, Aggressive Type; Hallucinogens and Cannabis Abuse; Borderline and Schizotypal Personality Disorders." He also opined that although he had suffered from a mental disease at the time of the crime, he had the ability to appreciate the

nature, quality, and wrongfulness of his conduct and the ability to conform his conduct to the requirements of law.

Summary of report of Dr. Berg:

After administering WAIS-R, Animal Choice Test, TAT, and Rorschach Test, Dr. Berg indicated that the referral had occurred because his attorney had in his possession forms written by Mr. Wilkins which presented rather morbid preoccupations regarding death and that he had shown a disinterest in mounting a legal defense and had shown readiness to accept the death penalty.

Dr. Berg found Mr. Wilkins to be functioning at a Full Scale IQ of 105. On subtests, he demonstrated a disinterest or inability to sustain logical and stepwise problem solving in situations calling for careful and deliberate thoughts. There was some tendency to associate ideas on the basis of rhythm. For example, when asked to explain Marie Curie's achievement, he said, "For inventing mercury." The definition of "plagiarize" was, "The act of getting pleasure." Although he appeared to have cognitive capabilities, his responses to abstraction and integration were impulsive and reflective of an inaccurate, vague, and mildly distorted understanding of social conventions. He also used words and phrases in an odd, idiosyncratic manner, such as describing a slender individual as "demuscular" and referring to Martin Luther King as "freedom mover." After citing several examples of his responses to test situations, Dr. Berg opined that Mr. Wilkins presented a picture of Conduct Disorder, Undersocialized, Aggressive Type, a disorder manifested by acting out towards the outside world in an attempt to suppress underlying feelings of anxiety, depression, and anger. It was his opinion that these feelings interfered with his ability to think clearly, thus, giving rise to impulsive action which when combined with his anger at the outside world, which has rejected him, lead to spasms of destructive action.

Summary of Presentence Report:

Mr. Steven Haynes, after reviewing the past reports as well as talking to his mother, concluded that probation was not possible on the charges of murder, first degree; armed criminal action; and no recommendations were offered.

It should be noted that Ms. Wilkins reiterated the fact that he felt like a celebrity in jail and while growing up she did not have time for Mr. Wilkins because of her preoccupation with his older brother Jerrod. She admitted denying existence of serious problems with Heath even though they were pointed out by authorities at Butterfield and Crittenton.

Summary of Pertinent Past History:

Mr. Wilkins is the younger of two sons born to his father and mother. He was born in Little Rock, Arkansas and did not remember his father since his parents were divorced when he was approximately four years of age. He was raised in a rather poor socioeconomic environment and did have some problems in his school years. He admittedly fought with other students and organized fights with bunches of people. Mr. Wilkins reportedly had extremely chaotic upbringing during his childhood. He was physically abused by his mother, sometimes the beatings would last for two hours. Mr. Wilkins, during my interviewing, described how he and his brother would get locked in the bedroom and tape would be placed on the door. If the tape was broken then they would get punished. In spite of this, he felt that he was his mother's favorite child. As a child, he started robbing houses for knives and money and loved to set fires. Mr. Wilkins' mother worked at night and slept during the day, thus, the children were left alone at night by themselves. He claims that he was started on drugs by his uncle. Apparently he used to shoot BB guns at passing cars. Mr. Wilkins indicated that his mother's boyfriend had a quick temper and that he hated him. He also started disliking his mother, not only because she punished them, but also because she stood up for her boyfriend who was unkind towards them. He then decided to poison his mother and boyfriend by placing rat poison in Tylenol capsules. They were informed by his brother about the situation. They secretly emptied the capsules and made him eat them. He was afraid of death and attempted vomiting by placing fingers in his throat. Then he ended up getting a beating from his mother and boyfriend. At the age of ten, Mr. Wilkins was evaluated at Tri-County Mental Health Center and Western Missouri Mental Health Center. He stayed there for a period of six months. He was then sent to Butterfield Youth's Home and then to East Range, a residential facility for boys. He started using drugs quite heavily. In addition to marijuana, which he grew on his own, he also abused inhalants, specifically a substance called "rush" which was a locker deodorant and gasoline. He additionally stole LSD from other residents which admittedly caused him to have hallucinations. He also started drinking hard liquor and because of his drug and alcohol usage, he was kicked out of the eighth grade.

At Butterfield, he was very angry at the teachers because they considered him to be "dumb." He showed rather strange behavior there. When he became depressed he would dance with a net over his head. On another occasion he cut his wrist and claimed to have had frequent thoughts of suicide. Prior to going to Butterfield, he had jumped off a bridge but the car swerved before he was hit. At Butterfield, he attempted to overdose with alcohol and drugs, and another time with antipsychotic medication, Mellaril. Mr. Wilkins was placed on Mellaril because he was "too

active." He stayed at the Butterfield Youth Home for three and one half years between the ages of 10 through 13-1/2. After that, he was transferred to Crittenton Center since it was closer to his mother's residence. He stayed there only for four or five months and was then kicked out. The court gave him permission to go home on probation. At this time his mother had started seeing another boyfriend and Mr. Wilkins apparently liked him. He continued the usage of alcohol and drugs while at school, continued to break into houses stealing money, jewelry, and knives, and generally stole money to spend at the arcade. On one occasion he ran away to Southern California. He was introduced to amphetamines there and spent all his money. His mother wired a ticket for him to return home. After his return, Mr. Wilkins was charged with a stolen knife and was sent to Detention Center in Mexico, Missouri. At age 15 he was sent to the Northwest Regional Youth Services in Kansas City. There, an attempt at prescribing Thorazine (major tranquilizer) was made. After this, Mr. Wilkins was placed in a foster home. He ran away from the foster home and lived in the basement of the home of a friend who was a tree trimmer and worked with him approximately two months. At this time he opted to go to the Job Corps. Thus, the parole was not violated. He went to Clearfield, Utah, but after a week he quit and returned to Kansas City to begin living on his own. Beginning in May of 1985, he lived on the streets, frequently sleeping in a park and dating a young girl whom he had met at Northwest Regional Youth Services. He actively looked for a job using his mother's phone number. However, his mother did not relay the calls to him and thus he continued to steal merchandise, selling it to a fence for profit. He was getting more and more involved with drugs and alcohol, LSD being his favorite drug. Prior to the alleged offense, he had been kicked out of his mother's house because she felt she was being lied to and he was living in a park with his friends. Mr. Wilkins reported that during this period of time he could not sleep, eat, or even engage in sex with his girlfriend. He was using homemade LSD quite often, and on the day of the alleged crime he had done three hits of "black dragon (LSD-like hallucinogen).

As per Dr. Logan's report, who had evaluated prior records at various facilities, indicated that Mr. Wilkins had expressed sadness and unhappiness related to not receiving attention from his mother, to staff at Tri-County Mental Health Center, and had fantasized about a possible relationship with his father which did not exist. He explained that the thefts were an attempt to gain his mother's attention and to look cool to his friends. Psychological testing at that time reflected a normal IQ, and the symptoms of anxiety, tearfulness, and depression were noted. The records also indicated that he had a tendency to deny conflicts alternately withdrawing into depression or acting out his depression in an aggressive, psychopathic manner without consideration of the consequences and a minimum of remorse. He openly talked about suicidal thoughts and felt to be at risk for

suicidal or homicidal attacks and the possibility of a thought disorder of paranoid nature was considered as a diagnostic possibility.

Records from Butterfield Youth Services in Marshall, Missouri indicated that Mr. Wilkins' natural father was committed to a mental institution in Arkansas, and there was considerable amount of physical abuse that existed in the family. Mr. Wilkins was considered to be a loner and had alienated his peers because of sarcastic, cutting remarks. He complained of stressed induced headaches and had difficulty concentrating on what he read or remembering visual or auditory materials, although a hearing evaluation revealed no problems. In the educational testing, he gave rather unusual responses. For example, when asked the reasons why we need policemen, he replied, "To get rid of people like me." He also revealed plans to blow up a large building in Kansas City saying there was too large a population, and the people would not be missed. He also made bizarre derogatory sexual comments towards women prior to visits with his mother. He had episodes of hyperventilation and passed out by fainting or chest squeezing. In the last six months of 1981, there was no family contact and he started becoming suspicious of adults and peers. On one occasion in September of 1981, he put gasoline into a toilet and set fire to it, causing an explosion. Mr. Wilkins' brother was diagnosed to be suffering from schizophrenia when he was admitted along with Mr. Wilkins in 1982 at Crittenton Center. Mr. Wilkins was often noted to be fantasizing about outer space and supernatural powers. In the fall of 1982, Dr. Chapel, the psychiatrist at Crittenton Center, recommended placement on Mellaril because of a "disoriented thinking pattern and high anxiety." In 1983, his condition started deteriorating. He was transferred to private tutoring from the public school, and he decided to try to earn his way out of the Youth Home. His final diagnoses in November of 1983 when he was discharged from Crittenton were Borderline Personality and Passive-Aggressive Personality. Psychological testing at Crittenton indicated isolated episodes of paranoid functioning. There was explicit distrust of doctors and others who pose to help him, whom he thought were interested in accomplishment of their own desires, and the treating psychologist expressed a serious concern about violent, destructive, and self-destructive action.

<u>Summary of Interview at Missouri State Penitentiary</u>:

Mr. Wilkins who is a rather diminutive individual with a short beard and moustache. He was handcuffed and interviewed in an open cell in the death row area. There were two officers sitting outside of the cell and I was accompanied by Ms. Penny Hooss, psychologist working at the Missouri State Penitentiary. After informing him of the purpose of my visit which he clearly understood, Mr. Wilkins decided to talk freely, however, repeatedly looked behind him at the officers as if to see if they

were hearing or watching him. He repeatedly tried to roll his own cigarettes to smoke, however, threw the tobacco and the paper on the floor, having failed in his attempts. On two occasions, he did borrow cigarettes from the guards. In spite of his suspiciousness Mr. Wilkins was quite cooperative during the interview and imparted information quite readily. Mr. Wilkins' interview was geared towards eliciting information to determine his ability to understand his Constitutional Rights and his reasons for waiving his right to counsel, in addition to assess his mental status in order to determine his ability to receive, retain, and recall information.

In spite of rather difficult circumstances, Mr. Wilkins talked rather freely and was functioning at the Bright Normal range of intelligence. This intelligence appeared to be consistent with his previous testing done by Dr. Berg.

Mr. Wilkins' version of the offense was basically similar to that he had imparted to other psychiatrists and police with one exception, that he stated that he did not plan to hurt anybody prior to the alleged offense, but merely had planned to rob in order to get money for drugs, although he did admit to the statement he had made to his codefendants and the police that he did not want any witnesses. Mr. Wilkins was able to give extensive details of his past history, including his tenure at Butterfield and Crittenton, as well as his treatment at Western Missouri Mental Health Center and Tri-County Mental Health Center. He recalled that his experiences there were rather horrifying. Mr. Wilkins dwelled rather extensively at his experiences at being put in straight jacket and being "pumped with Thorazine," causing him to feel like a "zombie." He also talked about being sexually abused at one of the Detention Centers in a tangential way while describing why he did not opt to be in the general population of Missouri State Penitentiary. Mr. Wilkins talked about his difficult times at home, including his anger towards his mother and stepfather (mother's boyfriend) who had been physically abusive towards him and his brother and readily admitted that he had had thoughts of killing them by putting rat poison "cyanide or arsenic" in Tylenol capsules and how he became horrified and scared to death when they found out about it, emptied the capsules, and made him swallow them. He compared such experiences at home with those at Butterfield, Crittenton, and the mental health centers, and how these experiences had led him to live on the streets and use drugs. His descriptions of all of these experiences as well as his feelings did not reveal any delusions (fixed ideas unshakable by logical reasoning). Mr. Wilkins denied any hallucinations (perceptions of hearing, seeing, feeling, smelling, or tasting without perceptual stimulation).

In order to understand his reasoning for waiving the counsel during the trial, Mr. Wilkins, in response to the question as to why he "fired his attorney," stated as follows: "I did not want

an attorney because he did not want to ask for the death penalty. I felt that no attorney would want me to do that, also they would argue that anybody that wants to die is not making the right decision. They feel that as long as you have life you have a chance. When I pleaded guilty, I didn't have an attorney, I told the judge I deserved the death penalty since I had committed a cold-blooded murder." When asked whether he was capable of presenting both aggravating and mitigating circumstances to arrive at the opinion that he should get the death penalty, Mr. Wilkins answered, "I don't know of any mitigating circumstances. They were saying that my background history was poor, but I don't think that anybody should drag other people into this." Mr. Wilkins admitted that he did not want his past history to be "dragged around" in the court. He continued that he had told Dr. Logan a lot of things but many things were then twisted around, and he felt that much of the information would not have helped him anyway. He stated for example, he was reported to have shot at passing cars, etc., "I didn't have any gun to shoot at passing cars, I had a BB gun. I wouldn't be that stupid to kill people like that." Mr. Wilkins further added that he did not want his mother's physical abuse of him to be brought out because he likes his mother and has developed a better relationship since his incarceration. When inquired as to why after pleading guilty he did not let the judge make up his mind about giving him either 50 years without parole or the death sentence since it was up to the judge to decide sentencing based on the information available to him, Mr. Wilkins stated, "I would rather die than spend the rest of my life in prison. I thought I would get better treatment if I asked for the death penalty because I would be in a special population. Have you seen what they can do, I have been told a lots of horror stories." When asked why he did not choose for a jury trial since it may have resulted in a lesser sentence, he stated, "What's the difference between 25 years and 50 years, you still have to spend your time in the general population, getting raped or stuck in the solitary and then they pump Thorazine and all kinds of stuff into you. People on the outside don't know how it is." Mr. Wilkins indicated that although he had not been in an adult prison, he was equating his experiences at Butterfield, Crittenton, and other mental hospitals to be equal to what he would be going through in the general population or possibly worse than that. In emphasizing this points, he indicated that he was placed in SMU (Social Maladjustment Unit), where he was placed in a solitary cell without any interaction with others and was stripped of all of his possessions as well as clothing. In his mind, this experience at the SMU was equivalent to what he had experienced on occasions at the other facilities which caused him to run away from them. He indicated that that's the kind of life he would have if he were to be in general population during 25 or 50 years, and thus, had opted for the death penalty. Mr. Wilkins was then questioned as to why he underwent psychiatric examinations if he had always wanted to plead guilty and opted for a death penalty. He indicated that he wanted to go through the

psychiatric examinations so that they could consider him competent and then he could plead guilty. Mr. Wilkins' reasoning as to why he told Dr. Logan about his desire to opt for a death penalty if he wanted to be considered competent, he stated he wanted Dr. Logan to know everything about himself because he wanted him to know why it would be better for him to die. When inquired as to why Mr. Wilkins wanted to discharge his attorney when he had indeed done his part to prove that he is not "insane" and that he was competent to stand trial, Mr. Wilkins stated, "My attorney would not go for a death penalty." When asked as to why he has not sought some legal counsel while he is staying at the death row, Mr. Wilkins stated, "I want the death penalty so why should I ask for an attorney to appeal my case. There is nothing to appeal." Later on he stated, "I want to shorten all the legal steps as much as possible." When asked whether he would be satisfied if all the legal appeals were exhausted and then he could be put to death the next day, Mr. Wilkins replied, "No, I'm not prepared for that yet." He also stated that he is not looking for suicide because, "If I wanted to just die and kill myself I would have done that since I have had many opportunities to do so in jail or at prison. When asked why then he would not be prepared to die the very next day, Mr. Wilkins replied, "Nobody wants to die and I have to prepare myself for it." At this point of questioning Mr. Wilkins started realizing that he is rather ambivalent about the death penalty and immediately started stating, "Are you going to file this report without any emotional bias or you're just going to say I'm incompetent. I'll be very disappointed with that."

Further inquiring as to why he did not want his background information presented as mitigating factors and why he now claims that he did not use any drugs prior to the alleged crime when he had already made the statements to both Dr. Logan and Dr. Mandracchia that he indeed was using LSD prior to the alleged crime and that his actions were described by him as "stupid" and that he was "consumed," in relation to this, and that he made a statement to the doctors examining him that he realized his actions did not make any sense, why he is denying those claims and statements now stating that he was not taking any drugs prior to the alleged crime. He hesitated, but then added that those can't be considered mitigating circumstances. Mr. Wilkins spontaneously stated, "Have you ever seen anybody put to death yet. There are lots of people sitting on the death row but nobody gets killed. They all get special treatment and you can go on for a long time before you can die, and I'm going to get that time."

Mr. Wilkins' orientation was appropriate. He was able to give the time, date, year, etc., as well as his demographic information appropriately. He was able to recollect past events in a rather chronological order without any difficulty in recollection. He was able to abstract from proverb, was somewhat idiosyncratic, he interpret the proverb 'Don't cry over spilt milk' as "You have to be responsible for what you do."

In order to determine what are the alternatives he could have or he has thought of in his particular legal situation, Mr. Wilkins was asked questions related to the understanding of his legal options. He indicated that he understood that if he were to be considered incompetent to waive his Constitutional Rights, he will have to be forcibly accept a legal counsel. He stated that he is afraid that if he were to be considered mentally disordered by a psychiatrist he may have to go back to a mental institutions which he detested the most. He also understood that if he is reconsidered for 50 years without parole because he has already pleaded guilty to first degree murder, he would be moving into general population which again is not a desirable option for him, primarily because of his feeling that he will be mistreated both by the staff and the inmates. Mr. Wilkins understood that there is a remote possibility of being pardoned by the Governor or there may be some technical problems in the presentation of his case which might result in overturning the decision or he might get a rehearing. He stated that in spite of that he does not see how he could get out of the prison system and that instead of going through his life in the general population, he would rather stay on the death row and take the death penalty.

DIAGNOSES:

Based on Mr. Wilkins' history and his age, he fits the diagnosis of Conduct Disorder, Undersocialized-Aggressive Type. The behavior that was taken into consideration for this diagnosis is evidenced by aggressive activity against persons and property, thefts outside of the home, having any peer or group friendships or relationships which lasted only over a very short period of time, evidence that he has shown remorse and guilt about certain actions which were considered dyssocial even when he was not incarcerated or was in any difficulty, his current situation which resulted as a collective action of four people, however, his refusal to blame them and take all of the responsibility upon himself and having had this behavioral difficulties for a number of years resulting in institutionalization. Mr. Wilkins also has an extensive history of alcohol and drug abuse having used gasoline, glue, pot, uppers and downers since the age of six on a rather regular basis and having used LSD quite frequently. These diagnoses are the primary diagnoses in his case and can be formally placed on Axis I of the Diagnostic Coding suggested by Diagnostic and Statistical Manual of Psychiatric Association.

The diagnosis on Axis II or disorders of personality and underlying difficulties in responses to stressful situations in an individual can be applicable in Mr. Wilkins' case as Dr. Logan had pointed out and Mr. Wilkins certainly meets the criteria for such diagnosis. His diagnosis under this axis would be that of Borderline Personality Disorder. A person with such disorder has difficulty in establishing a pattern of predictable response to

stressful situations vacillating between aggression towards others or self-destructive activity.

Other than this, Mr. Wilkins also has been seen to be exhibiting bizarre behavior, paranoid ideation, and idiosyncratic thinking dating back to 1982 when he was at Crittenton Center for drug and alcohol addiction and was diagnosed as suffering from schizophrenia. This diagnosis was not made at this time because of lack of further evidence and the possibility of many of his symptoms may be related to alcohol and drug usage.

DISCUSSION:

Having no clear-cut psychiatric test to determine competency to waive Constitutional Rights and legal counsel, it was felt necessary that one should define mental disease, defect, and disorder, ability to reason, and one's ability to act upon these reasons in a rational manner in order to arrive at an opinion whether Mr. Wilkins meets the appropriate criteria from a psychiatric viewpoint to waive his rights.

Mental disease and defect are legal terms for which there is very little definition available from a psychiatric viewpoint, however, it is generally accepted that mental disease is a term applied to conditions which present themselves as an abnormality of thinking or mood such as hallucinations, delusions, manic behavior, and depression, as well as pervasive anxiety which is manifested by paralysis of effective functioning in reality which is complained by an individual. Mental defect is a condition which causes a person to have difficulty in either receiving, retaining, or recalling information and applying it in reality situations. The latter is generally manifested by people who have mental retardation or organic brain deficit.

Mental disorders are defined as clinically significant behavioral or psychological syndromes or patterns that occur in an individual manifested either by a painful symptom or impairment in one or more important areas of functioning. Under this concept, Mr. Wilkins' condition appears to be related to a mental disorder rather than a defect or disease. Reviewing past history as well as records, it appears that Mr. Wilkins for most of the time has had conscious control over his behavior. However, the reasoning behind his conscious behavior appears to be based on lack of rationality and disregard for long-term consequences. For example, when he had tried to poison his mother and her boyfriend he seems to be quite aware of the wrongfulness of such action. However, in his mind his reasoning was "If they don't understand you or are abusing you then it is alright to kill them." Such rationalization discards any consequences of such action and jeopardizing one's future growth and freedom in view of immediate elimination of the problem at hand. It could be argued that similar thinking is present in antisocial persons, however, Mr.

Wilkins not only had not developed a full personality and was a child when such reasoning was evidenced. An antisocial individual is a physically mature person who does not have to depend on others for nurturance unlike Heath. Similar reasoning is evident in the alleged crime. Mr. Wilkins asking for the death penalty also seems to be based on such faulty reasoning. He starts by the premise that he deserves the death penalty because he had committed a cold-blooded murder. However, immediately adds that nobody on the death row has died yet, so not only that he will live but also will get the special privilege of being on the death row as opposed to the imagined torture and humiliation in the general population. It should be noted that Mr. Wilkins' description of what happens or what could happen in the general population of Missouri State Penitentiary is based on his experience at juvenile homes, foster homes, and mental health centers and not based on adult experience at these facilities. Awaiting his placement in death row, he was in the SMU (Social Maladjustment Unit) where he subjectively felt being treated worse than at the death row. He equates this to the treatment he would receive in the general population. During the interview, when it was repeatedly pointed out to him that there were several mitigating factors in his case he chose not to elaborate on them and repeatedly made the same statement over and over that he deserves the death penalty because he had committed a cold-blooded murder. Mr. Wilkins not wanting his mother to be brought into the court and to be portrayed as an unfit mother also seems to be based on the fact that he does not want to jeopardize his relationship with his mother which seems to have improved after his conviction. He tends to completely ignore the fact that he was living in the Penguin Park for several days having no place to live because of his mother's total abandonment in spite of his being a juvenile. Mr. Wilkins, during the current interview, denies any drug usage prior to the alleged crime, although he had admitted such to Dr. Logan on five occasions, again indicating that he vacillates in his choice of means to achieve the goal of wanting to be punished by death. If he had adequate and consistent reasoning he probably would have made the statement to Dr. Logan that he had premeditated the murder and that he did not have any drugs or alcohol in his system before he went there to the scene of the crime. His current denial and the statement that Dr. Logan had misunderstood many of his verbalizations appears to be an impulsive decision in order to expedite his execution again whether he really intends that is not clear because when a direct question is posed if he would like to be executed tomorrow if all the legal processes could be terminated today, he answers negatively, claiming that he is not ready to die yet. Thus, the reasoning for waiving his Constitutional Rights is based on his tendency to use limited pieces of information to justify his emotional bias. He tends not only to convict himself but also pass a judgment as to how he should be punished. This tendency was evident when asked by the trial judge for a recommendation.

Mr. Wilkins joined the prosecuting attorney in recommending a death penalty.

Mr. Wilkins' psychological test done by Dr. Berg also reveals his disinterest or inability to sustain logical and stepwise problem solving in situations calling for careful and deliberate thought.

His testimony at the time of his hearing on October 3, 1986 at the Supreme Court when summoned by Chief Justice Higgins, Mr. Wilkins instead of addressing the issues raised by the attorneys for amicus curiae and the Assistant Attorney General made rather curious comment which sounded almost like he was presenting the mitigating circumstances in his case, however, ended up stating that he had made a rational decision to waive the counsel. He stated, "Your Honor, there were several comments made into the question of my competency at the time of the crime, and also my competency at my trials and my hearings. I would like to, for the court to be aware of, as was stated by the ladies and gentlemen over there, that I had a .... I don't know the exact words to put it in, a background of mental and psychological problems and that I've been in some previous institutions. And I would just like for the court to be aware before the crime, I was in an institution known as Northwest Regional Youth Services, run by the Division of Family Services of the state of Missouri. That is an intense psychological and . . . intense psychological program to help children of the ages of 14 to 18 and to decide if they need any further mental evaluations . . . any help to help them proceed into society and to become decent citizens. I was in that program for I think as I can recall for over 9 months, and I completed that program and I was released on a . . . into the custody of my foster parents that I was assigned to, and I had, I guess, I would put it into my language, a clean bill of sale. I completed a highly intense evaluation and program set up by the state of Missouri specifically for situations and problem children like me, and I completed the program. And I would, as was mentioned by one of you gentlemen a little earlier, about Mandracchia, when he did his mental evaluation of me at the time, he did not know that I had intentions of seeking the death penalty. And then when Dr. Logan and his associates did their evaluation later in time, they did know that I was seeking the death penalty. And that there should give a very clear, as . . . let you see both sides of the, how should I put this . . . to let you understand that something wasn't spontaneous act, because at the time Mandracchia, the first mental evaluation was commenced, I had already made that decision and consulted with my attorney, Mr. Duchardt, who was at that time my attorney, about what I wanted to do. And then I asked him, don't . . . let's not . . . let's keep this between us, and so we went on with the evaluations. And I think that there has a lot to do with Dr. Logan's opinion that he would rather leave it to wiser souls than himself, which I respect.

Also there came up a question it was never questioned that . . . why I dismissed my public defender, Mr. Duchardt, why I dismissed him. And it was also stated that I said, 'Well if the attorney could help me get the death penalty.' At that time Mr. Duchardt was having some turmoil within himself because I was asking him to do something that was against his moral and ethical judgment and his values. And I felt it upon myself to make the decision that when an attorney is faced with those obstacles, that I would proceed in the direction in getting the goals that I wanted without the assistance of an attorney. And that is why, that is why I did that. That's all I want to say."

Having discussed the difficulty in Mr. Wilkins' reasoning capabilities, I would like to make a brief comment as to his cognitive capabilities. Without laboring into the findings of previous psychological tests I would have to concur that Mr. Wilkins' ability to perceive, retain, and recall information is adequate for the purposes of courtroom situations and if he wanted to he could impart the same information to his legal counsel. Thus, his determination that he was competent to proceed was appropriate. However, currently we are at a point where we have to determine whether Mr. Wilkins is capable of acting in his own behalf. This is where the question of reasoning ability and acting out impulsively without regard for long-term consequences etc. becomes a point of discussion. Both Dr. Logan and Dr. Berg had discussed this issue in their finding at length and behavioral observations of Mr. Wilkins' behavior at the institutions he was housed has been quite well documented in the records. These behavioral observations date back to 1980 and are congruent with the psychological test findings of Dr. Berg. These include his suicidal attempts, his aggressive behaviors and intense anger towards females. Another example of Mr. Wilkins acting out in a self-destructive manner is the fact that although he understands that he had committed a crime for which the penalty would be either 50 years in prison without parole or death penalty, he chooses the death penalty for unclear reasons. On one hand he claims to waive his right to counsel to expedite the process but on the other hand he does not want to be executed tomorrow, that being too soon. A person with a fully competent mind will not hesitate to take the quickest route if he has already determined the end. This clearly shows his impulsive and emotional decision making tendency based on faulty or inadequate information. He also fails to understand that the ultimate fact finding and judgment is the function of the jury or the judge and that he must impart truth but facts regarding his development, his reasoning, his understanding, and his feelings before the crime, at the time of the crime, and after the crime in order that appropriate punishment could be meted out. He also seemed to be rather concrete on his understanding of the degree of severity of his crime and his position seems to be that either he is free on the streets or he is put to death rather than "suffering" for a

long time in the prison population. Even if Mr. Wilkins was to plead guilty to the charges he should present an accurate picture of the facts as they occurred including his prior history of psychiatric problems in order for the judge or the jury to make an appropriate decision. It appears that such rational thinking is not present with Mr. Wilkins, partly because of his age, partly because of his lack of growth in an emotionally secure environment and lack of parental supervision which led to his subsequent inadequacy to establish himself as a person in his own right. Mr. Wilkins' background also includes a mental illness in his natural father as well as his brother which presents a strong possibility of genetic predisposition to mental disorder which may have contributed to his distorted reasoning.

SUMMARY AND RECOMMENDATIONS:

1. Mr. Wilkins suffers from a mental disorder which cannot be specifically considered a mental defect or disease within the meaning of Chapter 552.010, Revised Statutes of Missouri. However, this disorder does effect his rational reasoning and impairs his behavior.

2. Because of his mental disorder he suffers from an impairment of reasoning which prevents him from imparting information without judging his actions, he is not competent to waive his Constitutional Rights and represent himself in front of the court.

3. Because of his unimpaired ability to receive, retain, and recall information, he is competent to assist his attorney if one is appointed, although on occasions he may choose not to cooperate with him and evidentiary facts may have to be put forth by testimony of others.

Thanking you.

Respectfully submitted,

S. D. Parwatikar, M.D.
Forensic Psychiatrist

SDP/cmr

Supreme Court of Missouri

en banc

January 26, 1987

STATE OF MISSOURI,
Respondent,

vs.

HEATH A. WILKINS,
Appellant.

No. 68393

ORDER

The motion of Amicus Curiae to reverse and remand judgment and sentence is overruled.

On Court's own motion, the submission is set aside and the State Public Defender is appointed counsel to represent Appellant, Heath A. Wilkins in this appeal.

Day - to - Day

Andrew Jackson Higgins
ANDREW JACKSON HIGGINS
Chief Justic

STATE OF MISSOURI—SCT

I, THOMAS F. SIMON, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the order of said court, entered on the 26th day of January 1987 *as fully as the same appears of record in my office.*

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court. Done at office ~~in the City~~ of Jefferson, State aforesaid, this 26th day of January 1987.

Clerk

Susan Goldsmer D C

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN FINDING APPELLANT COMPETENT TO PROCEED AND IN FAILING TO MAKE A SEPARATE FINDING AS TO APPELLANT'S COMPETENCE TO WAIVE HIS CONSTITUTIONAL RIGHT TO COUNSEL AND TO A JURY TRIAL BECAUSE THE EVIDENCE WAS INSUFFICIENT TO ALLOW THE TRIAL COURT TO MAKE EITHER DETERMINATION IN THAT THE FINDING OF COMPETENCE WAS BASED ON THE TESTIMONY OF TWO DOCTORS, NEITHER OF WHOM HAD SPENT AN ADEQUATE AMOUNT OF TIME WITH APPELLANT AND WHOSE OPINIONS AS TO APPELLANT'S COMPETENCE DIFFERED IN SIGNIFICANT RESPECTS LEAVING SERIOUS QUESTIONS CONCERNING APPELLANT'S COMPETENCE UNRESOLVED. IN ADDITION, APPELLANT'S COMPETENCE TO WAIVE CONSTITUTIONAL RIGHTS WAS NOT AN ISSUE AT THE COMPETENCY HEARING, AND THEREFORE, THE COURT NEVER MADE A SPECIFIC FINDING ON THAT ISSUE.

Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed 2d 429 (1966);
Hays v. Murphy, 663 F.2d 1004 (10th Cir. 1981);
Rees v. Payton, 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966);
Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975);
Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960);
McCarthy v. State, 502 S.W.2d 397 (Mo. App., St.L.D. 1973);
Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966);
Seiling v. Eyman, 478 F.2d 211 (9th Cir. 1973);
Schoeller v. Dungar, 423 F.2d 1183 (9th Cir.) cert. denied, 400 U.S. 834 (1970);
Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982);
Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980);
Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978);

State v. Bibb, 702 S.W.2d 462 (Mo. banc 1985);
Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981);
Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979);
U.S. Const. amend V, XIV;
Article I, Section 10, Mo. Const. (1945);
Chapter 552, RSMo. 1986;
Section 565.030, RSMo 1986; and
Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 S.Cal.L.Rev. 1143 (1980).

II.

THE TRIAL COURT ERRED IN FAILING TO CONSIDER, ON THE RECORD, ANY EVIDENCE IN MITIGATION OF PUNISHMENT AT THE SENTENCING HEARING AND IN THEN SENTENCING APPELLANT TO DEATH IN THAT BY SO DOING IT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE PUBLIC POLICY AGAINST STATE-AIDED SUICIDE BECAUSE ITS ACTION CONTRAVENED THE STATUTORY PROVISIONS MANDATING THAT THE COURT CONSIDER ANY MITIGATING CIRCUMSTANCES SUPPORTED BY THE EVIDENCE; IT EFFECTIVELY PRECLUDES THIS COURT FROM REVIEWING THE PROPORTIONALITY OF THE SENTENCE, AND FURTHERS APPELLANT'S SUICIDAL GOAL OF RECEIVING THE DEATH PENALTY. IN THE ALTERNATIVE, THE TRIAL COURT ALSO PLAINLY ERRED IN, BY IMPOSING THE DEATH PENALTY, DETERMINING THAT THE TWO AGGRAVATING CIRCUMSTANCES OUTWEIGH THE THREE MITIGATING CIRCUMSTANCES BECAUSE, QUANTITATIVELY, THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES AND THE DEATH PENALTY SHOULD NOT HAVE BEEN IMPOSED AND ERRED IN FINDING THAT THE MURDER WAS OUTRAGEOUSLY OR WANTONLY VILE, HORRIBLE OR INHUMAN IN THAT IT INVOLVED TORTURE OR DEPRAVITY OF MIND BECAUSE THAT AGGRAVATING FACTOR VIOLATES APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS IN THAT THE STATUTORY LANGUAGE IS AMBIGUOUS AND PROVIDES VIRTUALLY NO GUIDANCE TO THE SENTENCING AUTHORITY.

Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed.2d 1337 (1949);
Williams v. Oklahoma, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959);

Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976);
Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977);
Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978);
State v. Lashley, 667 S.W.2d 712 (Mo. banc 1984), cert. denied, 469 U.S. 873 (1984);
People v. Deere, 41 Cal. 3d 353, 710 P.2d 925, 222 Cal. Rptr. 13 (en banc 1985);
Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978);
Massie v. Sumner, 624 F.2d 72 (9th Cir. 1980);
Godfrey v. Georgia, 466 U.S. 420 (1980);
Holtan v. Black, ___ F.Supp. ___, 40 Crim.L. 2174 (D. Neb. 1986) (No. CV84-L-393, 11/5/86);
G. Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L. Rev. 299 (1983);
U.S. Const., amends. VIII and XIV;
Rule 29.12;
Section 565.032, RSMo Cum. Supp. 1984;
Section 565.035, RSMo Cum. Supp. 1984);
MAI-CR2d 15.44;
Cal. Const. Art. VI, Section 11; and
Cal. Pen. Code Section 1239, subdivision (b).

III.

THE COURT SHOULD SET ASIDE APPELLANT'S DEATH SENTENCE BECAUSE IT IS EXCESSIVE AND DISPROPORTIONATE TO THE PUNISHMENT IMPOSED IN SIMILAR CASES AND IS THEREBY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT:

A) THE FACTS OF APPELLANT'S CASE WERE LESS EGREGIOUS THAN IN THE CAPITAL MURDER CASES IN WHICH THE DEFENDANT WAS GIVEN A LIFE SENTENCE;

B) APPELLANT WAS SHOWN TO HAVE COMMITTED THE MURDER UNDER EXTREME EMOTIONAL OR MENTAL DISTRESS DUE TO HAVING BEEN UNDER THE INFLUENCE OF LSD AND ALCOHOL WHEN COMMITTING THE MURDER, AND TO HAVING SUFFERED FROM A LONG-TERM HISTORY OF SUBSTANTIAL MENTAL ILLNESS; AND

C) APPELLANT WAS ONLY SIXTEEN YEARS OF AGE AT THE TIME HE COMMITTED THE MURDER.

Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982);
State v. Lashley, 667 S.W.2d 712 (Mo. banc 1984), cert. denied, 469 U.S. 873 (1984);
State v. Bolder, 635 S.W.2d 673 (Mo. banc 1982), cert. denied, 459 U.S. 1137 (1983);
State v. Boyd, 706 S.W.2d 461 (Mo. App., E.D. 1986);
State v. Emmitt F. Dunn, Ct. App., appeal pending;
State v. Walter Lee Harvey, Jr., Ct. App., appeal pending;
State v. Verna Mae Jones, Ct. App., appeal pending;
State v. Scott, 651 S.W.2d 199 (Mo. App., W.D. 1983);
State v. Weatherspoon, 716 S.W.2d 379 (Mo. App., W.D. 1986);
State v. Williams, 678 S.W.2d 345 (Mo. App., E.D. 1984);
State v. William Wirth, 715 S.W.2d 4 (Mo. App., W.D. 1986);
State v. Battle, 661 S.W.2d 487 (Mo. banc 1983), cert. denied, 466 U.S. 993 (1984);

State v. Boliek, 706 S.W.2d 847 (Mo. banc 1986);
State v. Gilmore, 681 S.W.2d 934 (Mo. banc 1984), cert. denied, ___ U.S. ___, 106 S.Ct. 2906;
State v. Smith, 649 S.W.2d 417 (Mo. banc 1983), cert. denied, 464 U.S. 908 (1983);
State v. Trimble, 638 S.W.2d 726 (Mo. banc 1982), cert. denied, 459 U.S. 1188 (1983);
G.R. Strafer, Volunteering for Execution: Competency, Voluntariness and Propriety of Third Party Intervention, 74 J. of Crim. Law & Criminology 860 (1983);
Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978);
Rest, Davison & Robbins, Age Trends in Judging Moral Issues, 49 Child Development 263 (1978);
Kohlberg, Development of Moral Character and Moral Ideology, in Hoffman & Hoffman, Review of Child Development Research, 404-405 (1964);
U.S. Const., amends. VIII and XIV;
Section 565.032, RSMo Cum. Supp. 1984; and
Section 565.035, RSMo Cum. Supp. 1984.

CITATIONS TO APPENDIX A
LIFE SENTENCE CASES

State v. George Allen Jr., 684 S.W.2d 417 (Mo. App., E.D. 1984);
State v. Robert Allen, 710 S.W.2d 912 (Mo. App., W.D. 1986);
State v. Shirley Allen, 714 S.W.2d 195 (Mo. App., S.D. 1986);
State v. Armbruster, 641 S.W.2d 763 (Mo. 1982);
State v. Ayers, appeal pending;
State v. Barr, 720 S.W.2d 1 (Mo. App., W.D. 1986);
State v. Bashe, 657 S.W.2d 321 (Mo. App., S.D. 1983);
State v. Baskerville, 616 S.W.2d 839 (Mo. 1981);
State v. Beck, 687 S.W.2d 155 (Mo. banc 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 2245 (1986);
State v. Betts, 642 S.W.2d 604 (Mo. 1982);
State v. Betts, 646 S.W.2d 94 (Mo. banc 1983);
State v. Borden, 605 S.W.2d 88 (Mo. banc 1980);
State v. Bostic, 625 S.W.2d 158 (Mo. 1981);
State v. Bounds, 716 S.W.2d 458 (Mo. App., E.D. 1986);
State v. Alfred Boyd, 664 S.W.2d 555 (Mo. App., W.D. 1983);
State v. Stanley Boyd, 706 S.W.2d 461 (Mo. App., E.D. 1986);
State v. John W. Brown, No appeal filed;
State v. Mark Anthony Brown, 665 S.W.2d 945 (Mo. App. 1984);
State v. Bryant, 705 S.W.2d 559 (Mo. App., E.D. 1986);
State v. Burke, 684 S.W.2d 871 (Mo. App., E.D. 1984);
State v. Burton, 710 S.W.2d 306 (Mo. App., E.D. 1986);

State v. Canterbury, 708 S.W.2d 662 (Mo. banc 1986);
State v. Jason C. Carr, 687 S.W.2d 606 (Mo. App., S.D. 1985);
State v. Rodney Carr, 708 S.W.2d 313 (Mo. App., SD. 1986);
State v. Carter, 674 S.W.2d 655 (Mo. App., E.D. 1984);
State v. Cason, 596 S.W.2d 436 (Mo. 1980), cert. denied, 449 U.S. 982 (1980);
State v. Gene A. Clark, 671 S.W.2d 1 (Mo. App., E.D. 1983);
State v. Raphael Clark, 711 S.W.2d 928 (Mo. App., E.D. 1986);
State v. Clemmons, 682 S.W.2d 843 (Mo. App., E.D. 1984);
State v. Clevenger, appeal pending;
State v. Coleman, 660 S.W.2d 201 (Mo. App., W.D. 1983);
State v. Cranmer, 699 S.W.2d 88 (Mo. App., W.D. 1985);
State v. Crespo, 664 S.W.2d 548 (Mo. App., E.D. 1983);
State v. Davis, 653 S.W.2d 167 (Mo. banc 1983);
State v. Dennis, 696 S.W.2d 843 (Mo. App., W.D. 1985);
State v. Dickson, 691 S.W.2d 334 (Mo. App., E.D. 1985);
State v. Downs, 593 S.W.2d 535 (Mo. 1980);
State v. Dunn, appeal pending;
State v. Edwards, 637 S.W.2d 27 (Mo. banc 1982);
State v. Eggers, 675 S.W.2d 923 (Mo. App., E.D. 1984);
State v. Emerson, 623 S.W.2d 252 (Mo. 1981);
State v. Englemen, 634 S.W.2d 466 (Mo. 1982);
State v. Fields, 668 S.W.2d 257 (Mo. App., S.D. 1984);
State v. Follins, 672 S.W.2d 167 (Mo. App., E.D. 1984);
State v. Michael Ford, 585 S.W.2d 472 (Mo. banc 1979);
State v. Robert Ford, 639 S.W.2d 573 (Mo. 1982);
State v. Franco, 625 S.W.2d 596 (Mo. 1981);
State v. Fuhr, 626 S.W.2d 379 (Mo. 1982);
State v. Fuhr, 660 S.W.2d 443 (Mo. App., W.D. 1983);
State v. Gardner, 618 S.W.2d 40 (Mo. 1981);
State v. Greathouse, 627 S.W.2d 592 (Mo. 1982);
State v. Griffin, 692 S.W.2d 314 (Mo. App., E.D. 1985);
State v. Groves, 646 S.W.2d 82 (Mo. banc 1983);
State v. James Hall, 612 S.W.2d 782 (Mo. 1981);
State v. Jesse Hall, 716 S.W.2d 392 (Mo. App., E.D. 1986);
State v. Hankins, 642 S.W.2d 606 (Mo. 1982);
State v. Harper appeal pending;
State v. Harvey, appeal pending;
State v. Hatcher, appeal pending;
State v. Hemme, 709 S.W.2d 909 (Mo. App., W.D. 1986);
State v. Hempnill, 699 S.W.2d 83 (Mo. App., E.D. 1985);
State v. Hempnill, 721 S.W.2d 86 (Mo. App. E.D. 1986);
State v. Henderson, 666 S.W.2d 882 (Mo. App., S.D.1984);
State v. Holmes, 609 S.W.2d 132 (Mo. banc 1980);
State v. Huggins, 612 S.W.2d 769 (Mo. 1981);
State v. Hughes, appeal pending;
State v. Hurt, 668 S.W.2d 206 (Mo. App., S.D. 1984);

State v. Ingram, 607 S.W.2d 438 (Mo. 1981);
State v. Jensen, 621 S.W.2d 263 (Mo. 1981);
State v. Jimmerson, 660 S.W.2d 475 (Mo. App., S.D. 1983);
State v. Cornelius Johnson, 606 S.W.2d 624 (Mo. banc 1980);
State v. Cornelius Johnson, Supreme Court No. 64402;
State v. Ivory Johnson, 672 S.W.2d 160 (Mo. App., E.D. 1984);
State v. Craig L. Jones, appeal pending;
State v. Verna Mae Jones, appeal pending;
State v. Kennedy, appeal pending;
State v. Kennedy, (Mo. App., S.D. No. 13949), appeal pending;
State v. Kinnard, 671 S.W.2d 336 (Mo. App., E.D. 1984);
State v. Knight, no appeal filed;
State v. Lawrence, 700 S.W.2d 111 (Mo. App., E.D. 1985), cert. denied, ___ U.S. ___ 106 S.Ct. 1951 (1986);
State v. Laws, 668 S.W.2d 234 (Mo. App., E.D. 1984);
State v. Laws, Supreme Court No. 63983, transferred to Court of Appeals, appeal pending;
State v. Laws, 699 S.W.2d 102 (Mo. App., S.D. 1985);
State v. Lipari, Supreme Court No. 62085, appeal dismissed pursuant to plea bargain;
State v. Loggins, 698 S.W.2d 915 (Mo. App., E.D. 1986);
State v. Lomax, 712 S.W.2d 698 (Mo. App., E.D. 1986);
State v. Lute, 608 S.W.2d 381 (Mo. banc 1980);
State v. Lute, 641 S.W.2d 80 (Mo. banc 1982);
State v. Malady, 669 S.W.2d 52 (Mo. App., E.D. 1984);
State v. Helen Martin, 666 S.W.2d 895 (Mo. App., E.D. 1984);
State v. Robert Martin, 651 S.W.2d 645 (Mo. App., S.D. 1983);
State v. McConnell, 676 S.W.2d 77 (Mo. App., W.D. 1984);
State v. Merritt, 694 S.W.2d 815 (Mo. App., W.D. 1985);
State v. Miller, 682 S.W.2d 838 (Mo. App., E.D. 1984);
State v. Miller, 714 S.W.2d 815 (Mo. App., S.D. 1986);
State v. Mitchell, 611 S.W.2d 223 (Mo. banc 1981);
State v. Morris, 639 S.W.2d 589 (Mo. banc 1982), cert. denied, --U.S.--, 103 S.Ct. 1438 (1983);
State v. Murphy, 693 S.W.2d 255 (Mo. App., W.D. 1985);
State v. Neal, 649 S.W.2d 261 (Mo. App., S.D. 1983);
State v. Noel, appeal pending;
State v. Patterson, 618 S.W.2d 663 (Mo. banc 1981);
State v. Potter, 657 S.W.2d 694 (Mo. App. W.D. 1983);
State v. Prewitt, 714 S.W.2d 544 (Mo. App., W.D. 1986;
State v. Price, 719 S.W.2d 801 (Mo. App., E.D. 1986);
State v. Randolph, 698 S.W.2d 535 (Mo. App., E.D. 1985);
State v. Randolph, appeal pending;

State v. Reasonover, 714 S.W.2d 706 (Mo. App., E.D. 1986);
State v. Reynolds, 608 S.W.2d 422 (Mo. 1980);
State v. Rickey, 658 S.W.2d 951 (Mo. App., S.D. 1983);
State v. Robinson, 641 S.W.2d 243 (Mo. banc 1982);
State v. Rodden, 713 S.W.2d 279 (Mo. App., S.D. 1986);
State v. Royal, 610 S.W.2d 946 (Mo. banc 1981);
State v. Salkil, 649 S.W.2d 509 (Mo. App., S.D. 1983), cert. denied, 464 U.S. 1010 (1983);
State v. Sanders, 660 S.W.2d 273 (Mo. App., E.D. 1983);
State v. Sargent, 702 S.W.2d 877 (Mo. App., E.D. 1985);
State v. Jeffrey Scott, 651 S.W.2d 199 (Mo. App., W.D. 1983);
State v. Keith Scott, 689 S.W.2d 758 (Mo. App., E.D. 1985);
State v. Kent Scott, appeal pending;
State v. Shaw, 646 S.W.2d 52 (Mo. 1983);
State v. Leroy Smith, appeal pending;
State v. Otis Smith, 684 S.W.2d 519 (Mo. App., E.D. 1984);
State v. Spivey, 701 S.W.2d 295 (Mo. App., E.D. 1986);
State v. Stephens, 672 S.W.2d 714 (Mo. App., S.D. 1984);
State v. Donald Stewart, appeal pending;
State v. Rodnie Stewart, 714 S.W.2d 724 (Mo. App., E.D. 1986);
State v. Stith, 660 S.W.2d 419 (Mo. App., S.D. 1983);
State v. Strickland, 609 S.W.2d 392 (Mo. banc 1981);
State v. Stuckey, 680 S.W.2d 931 (Mo. banc 1984);
State v. Tate, appeal pending;
State v. Taylor, appeal pending;
State v. Thomas, 625 S.W.2d 115 (Mo. 1981);
State v. Turner, 623 S.W.2d 4 (Mo. banc 1981), cert. denied, ___ U.S. ___ (1986);
State v. Valentine 646 S.W.2d 729 (Mo. 1983);
State v. Washington, 707 S.W.2d 463 (Mo. App., E.D. 1986);
State v. Weatherspoon, 716 S.W.2d 379 (Mo. App., W.D. 1986);
State v. Webster, 659 S.W.2d 286 (Mo. App., E.D. 1983);
State v. Donnell White, 694 S.W.2d 802 (Mo. App., W.D. 1985);
State v. Michael White, 622 S.W.2d 939 (Mo. banc 1981), cert. denied, 456 U.S. 963 (1982);
State v. Doyle Williams, 662 S.W.2d 277 (Mo. App., E.D. 1983);
State v. Ernest Williams, 659 S.W.2d 309 (Mo. App., E.D. 1983);
State v. James Williams, 678 S.W.2d 845 (Mo. App., E.D. 1984);
State v. Rondell Williams, 710 S.W.2d 395 (Mo. App., E.D. 1986);
State v. Vicky Lynn Williams, 611 S.W.2d 26 (Mo. banc 1981);

State v. Wilson, 645 S.W.2d 372 (Mo. 1983);
State v. Wirth, 715 S.W.2d 4 (Mo. App., W.D. 1986);
State v. Burton Woods, III, 662 S.W.2d 527 (Mo. App., E.D. 1983);
State v. Willard Woods, 639 S.W.2d 818 (Mo. 1982);
State v. Woolsey, 664 S.W.2d 37 (Mo. App., W.D. 1984);
State v. Yingst, 651 S.W.2d 641 (Mo. App., S.D. 1983); and
State v. Zietvogel, 655 S.W.2d 678 (Mo. App., W.D. 1983).

CITATIONS TO APPENDIX B
DEATH PENALTY CASES

State v. Antwine, Supreme Court No. 67720, appeal pending;
State v. Baker, 636 S.W.2d 902 (Mo. banc 1982), cert. denied, 459 U.S. 1183 (1983);
State v. Bannister, 680 S.W.2d 141 (Mo banc. 1984), cert.denied, --U.S.--, 105 S.Ct. 1879 (1985);
State v. Battle, 661 S.W.2d 487 (Mo. banc 1983), cert. denied, 463 U.S. 993 (1984);
State v. Bibb, 702 S.W.2d 462 (Mo. banc 1985);
State v. Blair, 638 S.W.2d 739 (Mo. banc 1982); cert. denied, 459 U.S. 1188 (1983), reh'g. denied, 459 U.S. 1229 (1983);
State v. Bolder, 635 S.W.2d 673 (Mo. banc 1982), cert. denied, 459 U.S. 1137 (1983);
State v. Bolick, 706 S.W.2d 847 (Mo. banc 1986);
State v. Byrd, 676 S.W.2d 494 (Mo. banc 1984), cert. denied, --U.S.--, 105 S.Ct. 1233 (1985);
State v. Cavaness, Supreme Court No. 67810, appeal pending;
State v. Chambers, 671 S.W.2d 781 (Mo. banc 1984);
State v. Chambers, 714 S.W.2d 527 (Mo. banc 1986);
State v. Driscoll, 711 S.W.2d 512 (Mo. banc 1986);
State v. Foster, 700 S.W.2d 440 (Mo. banc 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 2907 (1986);
State v. Gilmore, 650 S.W.2d 627 (Mo. banc 1983);
State v. Gilmore, 697 S.W.2d 172 (Mo. banc 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 2906 (1986);
State v. Gilmore, 661 S.W.2d 519 (Mo. banc 1983), cert. denied, 466 U.S. 945 (1984);
State v. Gilmore, 681 S.W.2d 934 (Mo. banc 1984), cert. denied, ___ U.S. ___, 106 S.Ct. 2906 (1986);
State v. Griffin, 662 S.W.2d 854 (Mo. banc 1983), cert. denied, 469 U.S. 873, 105 S.Ct. 224 (1984);
State v. Guinan, 665 S.W.2d 325 (Mo. banc 1984), cert. denied, 469 U.S. 873 (1986);
State v. Harvey, 692 S.W.2d 290 (Mo. banc 1985);
State v. Jonns, 679 S.W.2d 253 (Mo. banc 1984), cert. denied, --U.S.--, 105 S.Ct. 1413 (1985);
State v. Jones, 705 S.W.2d 19 (Mo. banc 1986), cert. denied, ___ U.S. ___, 106 S.Ct. 3286 (1986);

State v. Kenley, 693 S.W.2d 79 (Mo. banc 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1500 (1986);
State v. LaRette, 648 S.W.2d 96 (Mo. banc 1983), cert. denied, 464 U.S. 908 (1983), reh'g denied, 464 U.S. 1004 (1983);
State v. Lashley, 667 S.W.2d 712 (Mo. banc 1984), cert. denied, 469 U.S. 873 (1984);
State v. Laws, 661 S.W.2d 526 (Mo. banc 1983), cert. denied, 467 U.S. 1210 (1984);
State v. Malone, 694 S.W.2d 723 (Mo. banc 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 2292 (1986);
State v. Mathenia, 702 S.W.2d 840 (Mo. banc 1986), cert. denied, ___ U.S. ___, 106 S.Ct. 3286 (1986);
State v. McDonald, 661 S.W.2d 497 (Mo. banc 1983), cert. denied, 464 U.S. 1306, 105 S.Ct. 1875 (1985);
State v. McIlvoy, 629 S.W.2d 333 (Mo. banc 1982);
State v. Mercer, 618 S.W.2d 1 (Mo. banc 1981), cert. denied, 454 U.S. 933 (1981);
State v. Nave, 694 S.W.2d 729 (Mo. banc 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1500 (1986);
State v. Newlon, 627 S.W.2d 606 (Mo. banc 1982), cert. denied, 459 U.S. 884 (1982), reh'g denied, 459 U.S. 1024 (1982);
State v. O'Neal, 718 S.W.2d 498 (Mo. banc 1986);
State v. Preston, 673 S.W.2d 1 (Mo. banc 1984), cert. denied, 469 U.S. 893 (1984).
State v. Roberts, 709 S.W.2d 857 (Mo. banc 1986);
State v. Rodden, Supreme Court No. 67253, appeal pending;
State v. Schneider, Supreme Court No. 67941, appeal pending;
State v. Shaw, 636 S.W.2d 667 (Mo. banc 1982), cert. denied, 459 U.S. 928 (1982);
State v. Smith, 649 S.W.2d 417 (Mo. banc 1983), cert. denied, 464 U.S. 908 (1983);
State v. Stokes, 638 S.W.2d 715 (Mo. banc 1982), cert. denied, 460 U.S. 1017 (1983);
State v. Trimble, 638 S.W.2d 726 (Mo. banc 1982), cert. denied, 459 U.S. 1188 (1983);
State v. Williams, 652 S.W.2d 102 (Mo. banc 1983);
State v. Young, 701 S.W.2d 429 (Mo. banc 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1959 (1986), reh'g denied, ___ U.S. ___, 106 S.Ct. 3322 (1986); and
State v. Zeitvogel, 707 S.W.2d 365 (Mo. banc 1986).

IV.

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH IN THAT THE DEATH PENALTY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, UNDER ARTICLE I, SECTION 21 OF THE MISSOURI CONSTITUTION, AND UNDER THE CANONS OF INTERNATIONAL LAW AND, FURTHER, IT DEPRIVES APPELLANT OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 2, 10, AND 18(a) OF THE MISSOURI CONSTITUTION BECAUSE

A) DEATH IS DISPROPORTIONATELY SEVERE AND THEREFORE, AN EXCESSIVE PUNISHMENT UNDER INTERNATIONAL AND FEDERAL AND STATE CONSTITUTIONAL LAW IN APPELLANT'S CASE IN THAT THE CIRCUMSTANCES OF THE OFFENSE AND APPELLANT'S CHARACTER AT THE TIME OF THE OFFENSE INDICATE THAT A LIFE SENTENCE WITHOUT PROBATION OR PAROLE FOR FIFTY YEARS WOULD HAVE BEEN A MORE APPROPRIATE SENTENCE; AND

B) THE DEATH PENALTY IS UNJUSTIFIED AS A MEANS OF ACHIEVING ANY LEGITIMATE GOVERNMENTAL END AND IS, THEREFORE, EXCESSIVE, IN THAT THE STATE'S INTEREST IN PROTECTING THE PUBLIC FROM DANGEROUS CRIMINALS WHO COMMIT VIOLENT CRIMES, COULD BE ACHIEVED BY SENTENCING APPELLANT AND OTHER SIMILARLY SITUATED DEFENDANTS TO LIFE IMPRISONMENT WITHOUT PAROLE FOR FIFTY YEARS.

Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982);
Belotti v. Baird, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979);
Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966);
Dorszynski v. U.S., 418 U.S. 424, 94 S.Ct. 3042, 41 L.Ed.2d 855 (1974);
Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982);
Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977);
Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958);
U.S. Const., amends. VIII and XIV;
Mo. Const., Art. I, Section, 2, 10, 18(a) and 21;
Section 155.133, RSMo 1978;
Section 311.325, RSMo 1978;
Section 431.055, RSMo 1978;
Section 494.010, RSMo 1978;
Section 507.110, RSMo 1978;
Section 565.032, RSMo Cum. Supp. 1984;
Chapters 210 and 211, RSMo Cum. Supp. 1984;
Mo. Stat. Ann. Section 211.071 (Supp. 1985);
Federal Youth Corrections Act, 18 U.S.C. Sections 5005-5026;
Teeters-Zibulka, "Executions Under State Authority: 1864-1967", R.W. Bowers, Legal Homicide (1984);
V. Streib, Death Penalty for Juveniles: Past, Present and Future (1985);
V. Streib, Persons on Death Row as of December 1985 for Crimes Committed While Under Age Eighteen (1986);
ALI, Model Penal Code, Section 210.6 Comment, 133 (Official Draft & Revised Comment, 1980);
American Declaration for the Rights and Duties of Man, adopted at the Ninth International Conference of American States in 1948;
Hartman, "Unusual Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty", 52 U. of Cinn. L. Rev. 655, 666 n. 44 (1983);
U.S. Economic & Social Counsel, Report of the Secretary General on Capital Punishment at 17. U.N. DOC. E/5242 (1973);
Article 4(5) of the American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. K/XVI.1.1, DOC 65 Rev. 1 Corr.1 (1970);
International Covenant on Civil and Political Rights, Annex to G.A. Res. 2200, 21 U.S. GAIR Res. Supp. No. 16), at 51, U.S. DOC A/6316 (1966);
Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 68, 6 U.S.T. 3516, T.I.A.S. No. 3365 Section 75 U.N.T.S. 287;

ALI Model Penal Code Section 210.6(1)(d) (Proposed Official Draft, 1962); Section 210.6, Comment, 1331 Official Draft & Revised Comments (1980); ABA Report No. 117A, approved August 1983; and Carlson, Juvenile Offenders and the Electric Chair: Cruel and Unusual Punishment or Form Discipline for the Hopelessly Delinquent, 33 U. Fla. L. Rev. 344, 360-61 (1983).

552.020. Lack of mental capacity bar to trial or conviction—psychiatric examination, when, report of—commitment to hospital, when—statements of accused inadmissible, when.—1. No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.

2. Whenever any judge has reasonable cause to believe that the accused lacks mental fitness to proceed, he shall, upon his own motion or upon motion filed by the state or by or on

behalf of the accused, by order of record, appoint one or more private psychiatrists or psychologists, as defined in section 632.005, RSMo, or physicians with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals, who are neither employees nor contractors of the department of mental health for purposes of performing the examination in question, to examine the accused; or shall direct the director to have the accused so examined by one or more psychiatrists or psychologists, as defined in section 632.005, RSMo, or physicians with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals. The order shall direct that a written report or reports of such examination be filed with the clerk of the court. No private physician, psychiatrist, or psychologist shall be appointed by the court unless he has consented to act. The examinations ordered shall be made at such time and place and under such conditions as the court deems proper; except that, if the order directs the director of the department to have the accused examined, the director, or his designee, shall determine the time, place and conditions under which the examination shall be conducted. The order may include provisions for the interview of witnesses. The department shall establish standards and provide training for those individuals performing examinations pursuant to this section and section 552.030. No individual who is employed by or contracts with the department shall be designated to perform an examination pursuant to this chapter unless the individual meets the qualifications so established by the department. Any examination performed pursuant to this subsection shall be completed and filed with the court within sixty days of the order unless the court for good cause orders otherwise. Nothing in this section or section 552.030 shall be construed to permit psychologists to engage in any activity not authorized by chapter 337, RSMo.

3. A report of the examination made under this section shall include:

(1) Detailed findings;

(2) An opinion as to whether the accused has a mental disease or defect;

[illegible]

nation, by the court, of mental fitness to proceed; and

(5) A recommendation as to whether the accused, if found by the court to be mentally fit to proceed, should be detained in such hospital facility pending further proceedings.

4. If the accused has pleaded lack of responsibility due to mental disease or defect or has given the written notice provided in subsection 2 of section 552.030, the court shall order the report of the examination conducted pursuant to this section to include, in addition to the information required in subsection 3 of this section, an opinion as to whether at the time of the alleged criminal conduct the accused, as a result of mental disease or defect, did not know or appreciate the nature, quality, or wrongfulness of his conduct or as a result of mental disease or defect was incapable of conforming his conduct to the requirements of law.

5. If the report contains the recommendation that the accused should be committed to or held in a suitable hospital facility pending determination of the issue of mental fitness to proceed, and if the accused is not admitted to bail or released on other conditions, the court may order that the accused be committed to or held in a suitable hospital facility pending determination of the issue of mental fitness to proceed.

6. The clerk of the court shall deliver copies of the report to the prosecuting or circuit attorney and to the accused or his counsel. The report shall not be a public record or open to the public. Within ten days after the filing of the report, both the defendant and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a psychiatrist or psychologist, as defined in section 632.005, RSMo, or a physician with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals, of their own choosing and at their own expense. An examination performed pursuant to this subsection shall be completed and a report filed with the court within sixty days unless the court, for good cause, orders otherwise. A copy shall be furnished the opposing party.

7. If neither the state nor the accused nor his counsel requests a second examination relative to fitness to proceed or contests the findings of the report referred to in subsections 2 and 3 of this section, the court may make a determination and finding on the basis of the report filed or may hold a hearing on its own motion. [illegible]

opinion therein shall have the right to summon [illegible] and to cross-examine the examiner who rendered such opinion and to offer evidence upon the issue.

8. If the court determines that the accused lacks mental fitness to proceed, the criminal proceedings shall be suspended and the court shall commit him to the director of the department of mental health.

9. Any person committed pursuant to subsection 8 of this section shall be entitled to the writ of habeas corpus upon proper petition to the court that committed him. The issue of the mental fitness to proceed after commitment under subsection 8 of this section may also be raised by a motion filed by the director of the department of mental health or by the state, alleging the mental fitness of the accused to proceed. A report relating to the issue of the accused's mental fitness to proceed may be attached thereto. If the motion is not contested by the accused or his counsel or if after a hearing on a motion the court finds the accused mentally fit to proceed, or if he is ordered discharged from the director's custody upon a habeas corpus hearing, the criminal proceedings shall be resumed.

10. The following provisions shall apply after a commitment as provided in this section:

(1) Six months after such commitment, the court which ordered the accused committed shall order an examination by the head of the facility in which the accused is committed, or a qualified designee, to ascertain whether the accused is mentally fit to proceed and if not, whether there is a substantial probability that the accused will attain the mental fitness to proceed to trial in the foreseeable future. The order shall direct that written report or reports of the examination be filed with the clerk of the court within thirty days and the clerk shall deliver copies to the prosecuting attorney or circuit attorney and to the accused or his counsel. The report required by this subsection shall conform to the requirements under subsection 3 of this section with the additional requirement that it include an opinion, if the accused lacks mental fitness to proceed, as to whether there is a substantial probability that the accused will attain the mental fitness to proceed in the foreseeable future.

(2) Within ten days after the filing of the report, both the accused and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a psychiatrist or psychologist, as defined in section 632.005, RSMo, or a physician with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals [illegible] and at their [illegible] formed [illegible] completed and filed with the court [illegible] days unless the court, for good cause, [illegible] otherwise*. A copy shall be furnished [illegible] posing party.

(3) If neither the state nor the accused nor his counsel requests a second examination relative to fitness to proceed or contests the findings of the report referred to in subdivision [illegible] of this subsection, the court may make a determination and finding on the basis of [illegible] filed, or may hold a hearing on its own motion. If any such opinion is contested, the court shall hold a hearing on the issue. The report or reports may be received in evidence at any hearing on the issue but the party contesting any opinion therein relative to fitness to proceed shall have the right to summon and to cross-examine the examiner who rendered such opinion and to offer evidence upon the issue.

(4) If the accused is found mentally fit to proceed, the criminal proceedings shall be resumed.

(5) If it is found that the accused lacks mental fitness to proceed but there is a substantial probability the accused will be mentally fit to proceed in the reasonably foreseeable future, the court shall continue such commitment for a period not longer than six months, after which the court shall reinstitute the proceedings required under subdivision (1) of [illegible].

(6) If it is found that the accused lacks mental fitness to proceed and there is no substantial probability that the accused will be mentally fit to proceed in the reasonably foreseeable future, the court shall dismiss the charges and the accused shall be discharged, unless proper proceedings have been filed under chapter 632 or chapter 475, RSMo, in which case those sections and no others will be applicable. The probate division of the circuit court shall have concurrent jurisdiction over the accused upon the filing of a proper pleading to determine if the accused shall be involuntarily detained under chapter 632, RSMo, or to determine if the accused shall be declared incapacitated under chapter 475, RSMo, and approved for admission by the guardian under section 632.120 or 633.120, RSMo, to a mental health or retardation facility. When such proceedings are filed, the criminal charges shall be dismissed when the court makes its finding on whether the accused is mentally ill and should be committed or whether he is incapacitated and should have a guardian appointed.

11. The result of any examination made pursuant to this section shall not be a public record or open to the public.

12. No statement made by the accused in the course of any examination or treatment pursuant to this section and no information received by any examiner or other person in the course thereof, whether such examination or treatment was made with or without the consent of the accused or upon his motion or upon that of others, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding then or thereafter pending in any court, state or federal. A finding by the court that the accused is mentally fit to proceed shall in no way prejudice the accused in a defense to the crime charged on the ground that at the time thereof he was afflicted with a mental disease or defect excluding responsibility, nor shall such finding by the court be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

(L. 1963 p. 674 § 2, A.L. 1969 p. 572, A.L. 1971 S.B. 171, A.L. 1980 H.B. 1724, A.L. 1985 S.B. 265)

* Word "otherwise" does not appear in original rolls.

(1972) Where a copy of report of mental examination was furnished to prosecutor and contained a statement of facts made by appellant to the doctor concerning the crime with which he was charged but there was nothing in record, and appellant pointed to nothing, indicating that prosecutor thereby obtained information concerning the case not otherwise available to him, court did not err in failing to dismiss information. State v. Franklin (Mo.), 482 S.W. 2d 420.

(1972) This section does not apply to post trial procedure. A conviction while defendant is legally incompetent violates due process. Brown v. State (Mo.), 485 S.W. 2d 424.

(1973) State may not order commitment without express written notice that no other defense exists. Ex parte Kent (Mo.), 490 S.W. 2d 649. Cert. denied 94 S.Ct. 548.

(1973) Attempted suicide during trial did not require trial judge to order psychiatric examination under this section. Scope of discretion of trial judge discussed. Drope v. State (A.), 498 S.W. 2d 838.

(1973) Held that pretrial psychiatric examination report became a record in the criminal proceeding and court could take judicial notice of its contents when considering a motion to vacate. State v. Conner (A.), 500 S.W. 2d 300.

(1975) After receiving report of psychiatric examination indicating defendant's competency, his attorney was under no duty to contest the results and in order to charge his attorney with ineffective assistance defendant movant is required to show some basis for questioning the report. Shubert v. State (A.), 518 S.W. 2d 326.

(1975) This section constitutionally adequate to protect rights of accused. Suicide attempt during trial and psychiatric information available prior to trial together with testimony as to "strange behavior" creates a sufficient doubt of competence so as to require further inquiry on the question of competence. Drope v. Missouri (U.S.), 95 S.Ct. 896.

(1975) Magistrate at preliminary hearing has jurisdiction to inquire into accused's mental fitness to proceed. State v. Sturgell (A.), [illegible] S.W. 2d 434.

(1976) Held, examination by osteopath who was not a "licensed psychiatrist" met the requirements of this section. State v. Sharon (A.), [illegible] S.W. 2d [illegible].

(1976) Held, defendant is entitled to a competency hearing even though motion was not filed until day of trial. [illegible]

(A.), [illegible] S.W. 2d [illegible].

(1976) Held, that if report is contested the court must hold a competency hearing. State v. [illegible] (A.), 543 S.W. 2d 48.

[illegible]

(1964) The accused, for the purpose of attempting to establish his partial responsibility or his diminished capacity, may introduce evidence obtained in the section [illegible] examination. State v. Strubberg (Mo.), [illegible] S.W. 2d [illegible].

565.020. First degree murder, penalty.—1. A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

2. Murder in the first degree is a class A felony, except that the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor.

(L. 1983 S.B. 276)
Effective 10-1-84 (L. 1984 S.B. 445 § A)
Execution, location, duties of the warden, RSMo 546.730

DEATH PENALTY FOR JUVENILES:

PAST, PRESENT AND FUTURE

by

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Cleveland State University
Cleveland, Ohio 44115
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Prepared for distribution and discussion
at the 1985 Annual General Conference of the
National Coalition Against the Death Penalty,
held on November 15 and 16, 1985,
in Philadelphia, Pennsylvania.

EXHIBIT C

Death sentences and actual executions of persons for crimes committed while under age eighteen are rare but persistent phenomena which have spanned 343 years of American history. They began in Plymouth Colony, Massachusetts, in 1642 and have continued through 1985. Our past practice of executing juveniles reveals surprising facts and policies. Our current practice is no less surprising, absent a presumption that attitudes and policies should have changed after three and one-half centuries. The future seems fairly promising and may provide one small victory for opponents of the death penalty in their dark and dreary war against killing human beings to achieve governmental goals of justice.

Past Executions of Juveniles:

The most current list of verified executions of persons for crimes committed while under age eighteen establishes the total at 271 such persons. The first was Thomas Graunger, age sixteen or seventeen, who was executed in 1642 in Plymouth Colony, Massachusetts, for buggery of cattle. The last, as of this writing, was Charles Rumbaugh, age seventeen at the time of his robbery and murder of a jeweler, executed at age twenty-eight in Huntsville, Texas, on September 11, 1985.

The range of ages at the time of their crimes is from age seventeen down to age ten. The youngest ever at the time of his crime was James Arcene, executed by the federal government in Arkansas on June 26, 1885, for a crime committed when he was only ten years old. In this century, credit for executing the youngest offenders seems to be a contest between Florida and South Carolina. On April 27, 1927, Florida executed Fortune Ferguson, Jr., for a crime he committed when he was only thirteen or fourteen although he had reached age sixteen before being executed. South Carolina executed George Junius Stinney, Jr., on June 16, 1944, for a crime he committed at age fourteen and he was still only fourteen when executed.

Only nine of these 271 executed juveniles were females. Their ages ranged from twelve through seventeen. Beginning in 1786, the last execution of a juvenile girl was in 1912. However, as the appended list indicates, a juvenile girl currently awaits her execution on Georgia's death row.

The races of the offenders and victims in these 271 cases are quite predictable. Of the 271 offenders, 70% were black and 24% were white. For the victims of their crimes, 7% were black and 90% were white. The crimes were primarily murder (81%) but 15% were executed for rape and even a few were executed for attempted rape and attempted robbery.

Present Death Sentences for Juveniles:

As of October 1, 1985, a total of 1,590 persons are under a sentence of death and are imprisoned on the death rows of thirty-two states. Of this total death row population, thirty-two persons are on the death rows of sixteen states for crimes committed while under the age of eighteen. Although under the typical age limit for juvenile court when they committed their

crimes, some of them have been on death row for seven to ten years and are now in their mid-twenties. All thirty-two were convicted and sentenced to death for the crime of murder. The age, sex and race characteristics of these thirty-two persons are as follows:

Age at Time of Offense	Sex of Prisoner	Race of Prisoner
age 15 = 4	male = 31	white = 16
age 16 = 6	female = 1	black = 16
age 17 = 22	total = 32	total = 32
total = 32		

For the names of the thirty-two presently condemned juveniles and some information about their crimes and sentences, see the list appended to this report.

Future Perspective on the Death Penalty for Juveniles:

The total of thirty-two persons now on death row for crimes committed while under age eighteen is lower than at any time in recent history. In December, 1983, thirty-seven of the 1,289 persons then on death row (2.9%) had been under age eighteen at the time of their crimes. In December, 1984, the number was thirty-three of the 1,464 persons then on death row (2.3%). In October, 1985, the number has fallen to thirty-two of the 1,590 persons now on death row (2.0%).

Thus, even though the total death row population continues to grow by about 175 persons each year, the juvenile death row population continues to shrink. In 1984, only three such juveniles were sentenced to death (Rushing in Louisiana, Brown in North Carolina and Thompson in Oklahoma). For the first ten months of 1985, only two juveniles have been sentenced to death (Ward in Arkansas and Morgan in Florida). Generally, this steady decline in juvenile death sentences stems from the reluctance of prosecutors to bring capital cases and of juries to return capital sentences against juveniles. A large majority of capital punishment states still legally authorize such juvenile death penalties but the system seems more and more unwilling to impose them.

The practice of actually executing such juveniles has similarly declined to almost nil. However, the execution in Texas of Charles Rumbaugh on September 11, 1985, reminds us that the practice has not yet disappeared. Rumbaugh had been only seventeen years old at the time of his crime but had reached the age of twenty-eight when he was finally executed, having spent almost ten years on death row in Texas.

Several state legislatures are being asked to amend their death penalty statutes to establish a minimum for age at time of the crime. The American Bar Association, a fairly conservative organization which has never opposed the death penalty per se, has adopted an official policy opposing the death penalty for crimes committed while under age eighteen. Public opinion surveys as to attitudes about the death penalty continue to find

overwhelming support for it in general but majority opposition to the death penalty for crimes committed while under age eighteen.

Death penalty states are ripe for legislative lobbying and litigative argument opposing the death penalty for juveniles. The practice is disappearing even without changes in the law and the law makers can jump on the bandwagon. Even if the prospects are dismal for convincing them to stop killing our adult brothers and sisters in the name of justice, they seem willing to listen to reasons why they should stop killing our children.

APPENDIX: JUVENILES CURRENTLY ON DEATH ROW

ALABAMA:

Davis, Timothy: 17 at crime; white male; raped and murdered a sixty-year-old woman in a small town grocery store.

Jackson, Carnel: 16 at crime; black male; robbed and abducted Mr. and Mrs. Tucker, raped Mrs. Tucker and murdered them with shotgun; convicted and sentenced to death in November, 1981

Lynn, Frederick: 16 at crime; black male; burglarized and murdered sixty-one-year-old widow in February, 1981; originally convicted and sentenced to death but new sentence currently pending.

ARKANSAS:

Ward, Ronald: 15 years and six months at crime; black male; killed three white persons, twelve-year old male, seventy-two-year-old female and seventy-six-year-old female, also raping one of the females, in April 1985; convicted of murder and sentenced to death on September 20, 1985.

FLORIDA:

Magill, Paul: 17 years and 10 months at crime; white male; kidnapped, raped and murdered twenty-five-year-old store clerk in December, 1976; tried, convicted and originally sentenced to death in March, 1977; sentenced vacated but resentenced to death in 1981. On death row for over eight years.

Morgan, James: 16 at crime; white male; sexually assaulted and murdered a sixty-six-year-old widow in 1977; convicted and originally sentenced to death in 1978; sentenced reversed twice but again sentenced to death on June 7, 1985.

GEORGIA:

Burger, Christopher: 17 years and 8 months at crime; white male; robbed, kidnapped, sodomized and drowned male cab driver in September, 1977; convicted and sentenced to death but sentence reversed; death sentence subsequently reimposed. On death row almost eight years.

Buttrum, Janice: 17 years and 8 months at crime; white female; assisted husband in raping, robbing and killing female adult, stabbing her 97 times, in September, 1980; husband also convicted and sentenced to death but committed suicide.

High, Jose: 16 years and 11 months at crime; black/hispanic male; kidnapped and killed eleven-year-old boy in July, 1976; convicted and sentenced to death in November, 1978. On death row almost seven years.

Legare, Andrew: 17 at crime; white male; escaped from Youth Development Center and burglarized and killed handicapped man in May 1977; convicted and originally sentenced to death; sentence reversed but resentenced to death.

INDIANA:

Thompson, Jay: 17 at crime; white male; burglarized and murdered elderly couple in Petersburg, Indiana; convicted and sentenced to death in March, 1982.

KENTUCKY:

Stanford, Kevin: 17 at crime; black male; robbed, kidnapped, raped and murdered a young white woman; convicted and sentenced to death in August, 1982.

LOUISIANA:

Prejean, Dalton: 17 at crime; black male; shot and killed state trooper in July, 1977; convicted and sentenced to death in May, 1978. On death row for seven years.

Rushing, David: 17 at crime; white male; robbed and murdered cab driver; convicted and sentenced to death on testimony of accomplice.

MARYLAND:

Trimble, James: 17 years and 8 months at crime; white male; raped, beat and killed a young white woman in July, 1981; convicted and sentenced to death in March, 1982.

MISSISSIPPI:

Jones, Larry: 17 at crime; black male; robbery of retail store with two co-felons during which owner (WM in 70s) was killed on Dec. 2, 1974; convicted and sentenced to death in March 1975 but reversed on appeal; retried in December 1977 and again sentenced to death; sentence reversed by federal district court and affirmed by Fifth Circuit in September 1984; retrial uncertain.

Tokman, George: 17 years and 6 months at crime; white male; robbed and killed an elderly black cab driver in August, 1980; convicted and sentenced to death in September, 1981.

MISSOURI:

Lashley, Frederick: 16 at crime; black male; robbed and killed his handicapped, fifty-five-year-old foster mother in April, 1981; convicted and sentence to death.

NEW JERSEY:

Bey, Marko: 17 years and 11 months at crime; black male; raped and killed two teenage women in April, 1983; convicted and sentenced to death in September, 1983

NORTH CAROLINA:

Brown, Leon: 15 years and 9 months at crime; black male; along with older brother, raped and killed eleven-year-old black girl in September, 1983; convicted and sentenced to death in October, 1984.

Stokes, Freddie Lee: 17 at crime; black male; robbed and murdered adult white male in December, 1981; convicted and sentenced to death in June 1982; sentence reversed but resentenced to death.

OKLAHOMA:

Thompson, Wayne: 15 at crime; white male; along with older brother and two others, kidnapped, beat and killed ex-brother-in-law; convicted and sentenced to death in the spring of 1984.

PENNSYLVANIA:

Aulisio, Joseph: 15 at crime; white male; killed two white children, a girl age 8 and a boy age 4, in July, 1981; convicted and sentenced to death in May, 1982.

Hughes, Kevin: 16 at crime; black male; raped and killed a nine-year-old girl in 1979; convicted and sentenced to death in March, 1981.

SOUTH CAROLINA:

Roach, James Terry: 17 years and 8 months at crime; white male; along with others he raped and killed a fourteen-year-old girl and killed her boyfriend in October, 1977; confessed and was convicted and sentenced to death in December, 1977. On death row over seven years.

TEXAS:

Burns, Victor Renay: 17 at crime; black male; with older brother and another friend, robbed and killed young factory worker.

Cannon, Joseph John: 17 at crime; white male; robbed and murdered adult woman.

Carter, Robert A.: 17 at crime; black male; robbed and killed teenage female clerk at small store in June, 1981; convicted and sentenced to death in March, 1982.

Garrett, Johnny Frank: 17 at crime; white male; raped and killed a seventy-six-year-old nun.

Graham, Gary: 17 at crime; black male; robbed and murdered an adult male in May, 1981.

Harris, Curtis Paul: 17 at crime; black male; along with older brother, robbed and killed an adult male.

Pinkerton, Jay K.: 17 at crime; white male; raped and killed two young white women in 1979; convicted and sentenced to death; execution stayed by U.S. Supreme Court on August 14, 1985, only a few minutes prior to scheduled execution.

PERSONS ON DEATH ROW AS OF DECEMBER 1985 FOR CRIMES COMMITTED WHILE UNDER AGE EIGHTEEN

by

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Prepared for distribution to research colleagues and for use in ongoing litigation.

January 1986

EXHIBIT D

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As of December 20, 1985, a total of thirty-two persons are on death row for crimes committed while under age eighteen. This total of thirty-two condemned persons under the typical juvenile court age is less than at any time in recent history. In December, 1983, thirty-seven of the 1,289 persons then on death row (2.9%) had been under age eighteen at the time of their crimes. In December, 1984, the number was thirty-three of the 1,464 persons then on death row (2.3%). In December, 1985, the number has fallen to thirty-two of the 1,642 persons now on death row (1.9%).

Thus, even though the total death row population continues to grow by about 175 persons each year, the juvenile death row population continues to shrink. In 1984, only three such juveniles were sentenced to death (Rushing in Louisiana, Brown in North Carolina and Thompson in Oklahoma). Similarly, only three juveniles were sentenced to death in 1985 (Ward in Arkansas, and Livingston and Morgan in Florida). Generally, this steady decline in juvenile death sentences stems mostly from the reluctance of prosecutors to bring capital cases and of juries to return capital sentences against juveniles. A large majority of capital punishment states still legally authorize such juvenile death penalties but the criminal justice system seems more and more unwilling to impose them.

The practice of actually executing such juveniles has similarly declined to almost nil. However, the execution in Texas of Charles Rumbaugh on September 11, 1985, reminds us that the practice has not yet disappeared. Rumbaugh had been only seventeen years old at the time of his crime but had reached the age of twenty-eight when he was finally executed, having spent almost ten years on death row in Texas. South Carolina has scheduled the execution of James Terry Roach for January 10, 1986. Like Rumbaugh, Roach was only seventeen at the time of his crime.

As of December 20, 1985, a total of 1,642 persons are under a sentence of death and are imprisoned on the death rows of thirty-two states. Of this total death row population, thirty-two persons are on the death rows of sixteen states for crimes committed while under the age of eighteen. Although under the typical age limit for juvenile court when they committed their crimes, some of them have been on death row for seven to nine years and are now in their late twenties. All thirty-two were convicted and sentenced to death for the crime of murder. The age, sex and race characteristics of these thirty-two persons are as follows:

Age at Time of Offense	Sex of Prisoner	Race of Prisoner
age 15 = 4	male = 31	white = 16
age 16 = 5	female = 1	black = 16
age 17 = 23	total = 32	total = 32
total = 32		

The 32 condemned juvenile offenders are as follows:

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ALABAMA:

Davis, Timothy: 17 at crime; white male; raped and murdered a sixty-year-old woman in a small town grocery store.

Jackson, Carnel: 16 at crime; black male; robbed and abducted Mr. and Mrs. Tucker, raped Mrs. Tucker and murdered them with shotgun; convicted and sentenced to death in November, 1981

ARKANSAS:

Ward, Ronald: 15 years and six months at crime; black male; killed three white persons, twelve-year old male, seventy-two-year-old female and seventy-six-year-old female, also raping one of the females, in April 1985; convicted of murder and sentenced to death on September 20, 1985.

FLORIDA:

Livingston, Jesse James: 17 at crime; black male; shot and killed adult female store clerk during robbery in February 1985; convicted in September and sentenced to death in October 1985.

Magill, Paul: 17 years and 10 months at crime; white male; kidnapped, raped and murdered twenty-five-year-old store clerk in December, 1976; tried, convicted and originally sentenced to death in March, 1977; sentenced vacated but resentenced to death in 1981. On death row for almost nine years.

Morgan, James: 16 at crime; white male; sexually assaulted and murdered a sixty-six-year-old widow in 1977; convicted and originally sentenced to death in 1978; sentenced reversed twice but again sentenced to death on June 7, 1985.

GEORGIA:

Burger, Christopher: 17 years and 8 months at crime; white male; robbed, kidnapped, sodomized and drowned male cab driver in September, 1977; convicted and sentenced to death but sentence reversed; death sentence subsequently reimposed. On death row almost eight years.

Buttrum, Janice: 17 years and 8 months at crime; white female; assisted husband in raping, robbing and killing female adult, stabbing her 97 times, in September, 1980; husband also convicted and sentenced to death but committed suicide.

High, Jose: 16 years and 11 months at crime; black/hispanic male; kidnapped and killed eleven-year-old boy in July, 1976; convicted and sentenced to death in November, 1978. entence currently being reconsidered. On death row over seven years.

Legare, Andrew: 17 at crime; white male; escaped from Youth Development Center and burglarized and killed handicapped man in May 1977; convicted and originally sentenced to death; sentence reversed but resentenced to death.

INDIANA:

Thompson, Jay: 17 at crime; white male; burglarized and murdered elderly couple in Petersburg, Indiana; convicted and sentenced to death in March, 1982.

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Stanford, Kevin: 17 at crime; black male; robbed, kidnapped, raped and murdered a young white woman; convicted and sentenced to death in August, 1982.

LOUISIANA:

Prejean, Dalton: 17 at crime; black male; shot and killed state trooper in July, 1977; convicted and sentenced to death in May, 1978. On death row for seven years.

Rushing, David: 17 at crime; white male; robbed and murdered cab driver; convicted and sentenced to death on testimony of accomplice.

MARYLAND:

Trimble, James: 17 years and 8 months at crime; white male; raped, beat and killed a young white woman in July, 1981; convicted and sentenced to death in March, 1982.

MISSISSIPPI:

Jones, Larry: 17 at crime; black male; robbery of retail store with two co-felons during which owner (WM in 70s) was killed on Dec. 2, 1974; convicted and sentenced to death in March 1975 but reversed on appeal; retried in December 1977 and again sentenced to death; sentence reversed by federal district court and affirmed by Fifth Circuit in September 1984; retrial uncertain.

Tokman, George: 17 years and 6 months at crime; white male; robbed and killed an elderly black cab driver in August, 1980; convicted and sentenced to death in September, 1981.

MISSOURI:

Lashley, Frederick: 16 at crime; black male; robbed and killed his handicapped, fifty-five-year-old foster mother in April, 1981; convicted and sentence to death.

NEW JERSEY:

Bey, Marko: 17 years and 11 months at crime; black male; raped and killed two teenage women in April, 1983; convicted and sentenced to death in September, 1983

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Brown, Leon: 15 years and 9 months at crime; black male; along with older brother, raped and killed eleven-year-old black girl in September, 1983; convicted and sentenced to death in October, 1984.

Stokes, Freddie Lee: 17 at crime; black male; robbed and murdered adult white male in December, 1981; convicted and sentenced to death in June 1982; sentence reversed but resentenced to death.

OKLAHOMA:

Thompson, Wayne: 18 at crime; white male; along with older brother and two others, kidnapped, beat and killed ex-brother-in-law; convicted and sentenced to death in the spring of 1984.

PENNSYLVANIA:

Aulisio, Joseph: 15 at crime; white male; killed two white children, a girl age 8 and a boy age 4, in July, 1981; convicted and sentenced to death in May, 1982.

Hughes, Kevin: 16 at crime; black male; raped and killed a nine-year-old girl in 1979; convicted and sentenced to death in March, 1981.

SOUTH CAROLINA:

Roach, James Terry: 17 years and 8 months at crime; white male; along with others he raped and killed a fourteen-year-old girl and killed her boyfriend in October, 1977; confessed and was convicted and sentenced to death in December, 1977. On death row over eight years. Execution presently scheduled for January 10, 1986.

TEXAS:

Burns, Victor Renay: 17 at crime; black male; with older brother and another friend, robbed and killed young factory worker. Sentence currently being reconsidered.

Cannon, Joseph John: 17 at crime; white male; robbed and murdered adult woman.

Carter, Robert A.: 17 at crime; black male; robbed and killed teenage female clerk at small store in June, 1981; convicted and sentenced to death in March, 1982.

Garrett, Johnny Frank: 17 at crime; white male; raped and killed a seventy-six-year-old nun.

Graham, Gary: 17 at crime; black male; robbed and murdered an adult male in May, 1981.

Harris, Curtis Paul: 17 at crime; black male; along with older brother, robbed and killed an adult male.

Pinkerton, Jay K.: 17 at crime; white male; raped and killed two young white women in 1979-1980; convicted and sentenced to death; execution stayed by U.S. Supreme Court on August 14, 1985, and on November 25, 1985, each time only a few minutes or hours prior to scheduled execution.

COUNTY OF BOONE)
) S.S.
STATE OF MISSOURI)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

HEATH A. WILKINS,
Petitioner,
vs.
STATE OF MISSOURI,
Respondent.

No. 87-6026

CERTIFICATE OF FILING BY MAIL OF
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSOURI

Having been duly sworn, Lew A. Kollias, attorney for the Petitioner, pursuant to Rule 28.2, certifies to this Court that a Petition for Writ of Certiorari in this case is due on December 12, 1987, and that he filed the petition and accompanying *in forma pauperis* motion and affidavit with the Court within the time allowed, by mailing them on December 8, 1987, by United States Mail, first class postage prepaid, addressed to Mr. Joseph F. Spaniol, Jr., Clerk, Supreme Court of the United States, One First Street, N.E., Washington, D.C. 20543.

Respectfully submitted,

Lew A. Kollias
Attorney for Petitioner
209B East Green Meadows Road
Columbia, Missouri 65203-3698
(314) 442-1101

8th Subscribed and sworn to before me, a Notary Public, on this day of December, 1987.

Deborah R. Dijak, Notary Public

My Commission Expires August 17, 1990.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

HEATH A. WILKINS,
Petitioner,
vs
STATE OF MISSOURI,
Respondent.

No. 87-6026

CERTIFICATE OF SERVICE OF
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSOURI

Comes now, Lew A. Kollias, attorney for Petitioner, to certify that on the 8th day of December, 1987, I mailed by United States Postal Service, postage prepaid, one copy of the Petition for Writ of Certiorari and accompanying *in forma pauperis* motion and affidavit in this case to Mr. William Webster, Attorney General of the State of Missouri, P.O. Box 899, Jefferson City, Missouri 65102, counsel for Respondent. I further certify that all parties required to be served have been served

Respectfully submitted,

Lew A. Kollias
Attorney for Petitioner
209B East Green Meadows Road
Columbia, Missouri 65203-3698
(314) 442-1101

COUNTY OF BOONE)
) S.S
STATE OF MISSOURI)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

HEATH A. WILKINS,
Petitioner,
vs.
STATE OF MISSOURI,
Respondent.

No. 87-6026

ENTRY OF APPEARANCE FOR
PETITION FOR WRIT OF CERTIORARI TO THE
MISSOURI COURT OF APPEALS, EASTERN DISTRICT

Comes now, Lew A. Kollias, a member of the Bar of the United States Supreme Court, to enter his appearance as attorney for the Petitioner in this case. Mr. Kollias' address is Office of State Public Defender, 209B East Green Meadows Road, Columbia, Missouri 65203-3698. He also can be reached at (314) 442-1101.

Respectfully submitted,

Lew A. Kollias
Attorney for Petitioner